THE

HISTORY

OF THE

CASES

OF

CONTROVERTED ELECTIONS,

WHICH WERE

Tried and determined during the First Session of the Fourteenth Parliament of GREAT BRITAIN.

XV GEO. III.

By SYLVESTER DOUGLAS, Esq; of LINCOLN'S-INN.

Mais si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être a un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient une opinion particuliere du juge on vivroit dans la societé sans sçavoir préciſément les engagemens que l'on y contracte.

L'Esprit des Loix, liv. xi. c. 6.

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INTRODUCTION.

SECTION I.

Of the Juriſdiction of the Houſe of Commons in the Trial of Controverted Elections.

THE particular conſtitution of the great legiſlative Council of this country, before the Norman invaſion, continues to be a matter of much obſcurity. After the laborious enquiries of learned men, and the more penetrating reſearches of zeal and party, we ſeem to be ſtill only poſſeſſed of probable and conjectural evidence, that the Commons had then a ſhare in the legiſlature. Of the mode in which they may have exerciſed their legiſlative powers, we are, I believe, altogether ignorant.

Whatever reaſon we may have to conclude, that the Saxon, and Daniſh invaders of this iſland, brought with them the rudiments of the feudal government, which were common to all the migrating tribes of the North, yet it is certain, that thoſe rude warriours were unacquained with the numerous refinements, which were, afterwards, conſidered as of the very eſſence of that form of polity; ſuch as the law of guardianſhip, marriage, reliefs, and primer ſeiſin. Theſe were the invention of ſubtle lawyers and politicians, and, as it were, the offſpring of riper years; which is evident from this conſideration, among many others, that they all depend upon the tranſmiſſible, hereditary nature of fiefs; a quality they did not acquire, till about a century before the Conqueſt (A).

It is probable, that ſome of the later Saxon monarchs introduced, in part, into England, the changes which had taken place on the continent; particularly Edward the Confeſſor; who, having received his education in Normandy, was, all his life, attached to the language, the manners, and the laws of that country. But it was

William the Conqueror, and his immediate ſucceſſors, who eſtabliſhed the feudal ſyſtem univerſally over their new dominions, with all its complicated and oppreſſive train of attendants, ſuch as it already exiſted in their continental territories.

During the firſt reigns after the Conqueſt, the great Council ſeems to have been little more than a ſort of royal court-baron, conſiſting of the king's immediate tenants, in like manner as the ſuitors in the inferior courts baron were the tenants of the lords. Yet, even at that period, the Commons appear to have given their ſanction to thoſe general conſtitutional acts, known under the names of the Great Charters of Henry I. Henry II. and John.

From the end of the reign of Henry III. or rather from the middle of that of his ſon, we have authentic evidence of Parliaments conſtituted nearly as they are at preſent; compoſed of three diſtinct branches, the King, Lords, and Commons; and the third branch, from that æra, has always conſiſted of the repreſentatives of the people, choſen by the freeholders (B) of the counties, and by different claſſes of men, in the different cities and boroughs of the kingdom.

The origin of that diverſity which we obſerve in the right of voting for repreſentatives, in different boroughs, is a ſubject of curious diſquiſition, but cannot be explained with any degree of certainty. It may be conjectured that, in ſome inſtances, the right was limited to a particular claſs of men, by the King's charter, under which, the borough derived its title to ſend members to Parliament; for our Kings claimed, and exerciſed, the prerogative of conferring that important privilege, down to the end of the reign of Charles II. (C). In other inſtances, where the city or borough began to chooſe members from the firſt epoch of repreſentation, without having received any royal charter to regulate who ſhould elect, it is probable all thoſe were admitted to vote, who were deemed capable of giving a free ſuffrage. Hence we find the right of election, in ſome places, confined to particular members of the corporation, and, in others, common to the inhabitants at large.

large. In ſome caſes, perhaps, the ſheriff, who long exerciſed a very great diſcretionary authority as to borough-elections (D), preſcribed who the perſons ſhould be who were to concur in the choice.

Be this, however, as it may, for a long courſe of years, few queſtions aroſe concerning conteſted elections (E). There were ſeldom competitors for an office which was rather a burthen impoſed, than a diſtinction conferred (F). Some inſtances of this ſort are to be met with in early times; but, when they did occur, there was no ſettled tribunal for their deciſion. They were determined ſometimes in Weſtminſter-hall, and ſometimes by the Lords in Parliament (G). The Commons were not, in thoſe days, jealous of the interference of the Crown, or the Peers. The hiſtory of England furniſhes many other examples, where they appear to have neglected, or abandoned, privileges of the utmoſt importance. When Simon de Bereford, a commoner, was, at the ſpecial inſtance of the King, tried, and condemned by the Peers, for high treaſon, in the beginning of the reign of Edward III. the Lords themſelves proteſted againſt the precedent; thinking it beneath their dignity, to be burthened with the trial of criminals, who were not of their own degree. But there is no account of any alarm taken by the Commons; no hint that they regarded this proceeding as an encroachment upon their order, or an infringement of their rights (H). Edward the firſt granted to the People (1), "that, if "they liſted, they ſhould have the election of their "ſheriff, in every ſhire where the ſhrievalty was not "of fee." But they valued this franchiſe ſo little, that his ſon, at the particular requeſt of the people, reſumed it, and enacted (2), "that ſheriffs ſhould thenceforward "be aſſigned by the chancellor, treaſurer, barons of "the exchequer, and the juſtices."—Nor can this ſurprize us, when we conſider that, during the vigour of the feudal ariſtocracy, the People, finding themſelves incapable of ſelf-protection, were only ambitious of the patronage of ſome powerful baron, and were, in a great

 meaſure,

(1) 28 Edw. I. Stat. iii. cap. 8. an. 1300.
(2) 9 Edw. II. Stat. ii. An. 1315.

meaſure, ſtrangers to that ſpirit of independence, which is now the characteriſtic of our conſtitution.

In the ſucceſſion of ages, a mighty change took place in moſt of the feudal governments; particularly in England. The exorbitant power of the barons, which the King's feeble and limited authority was unable to controul, gave riſe to numberleſs jealouſies and civil wars; till a great part of their ancient territories, were either exhauſted by the efforts they made, or reciprocally confiſcated, by the party which chanced, at different times, to prevail. Many of the moſt conſiderable families were entirely extinguiſhed, either by the fortune of war, or the ſword of juſtice; and, when the conteſt between the two roſes was finally terminated by the union of the houſes of York and Lancaſter, in the perſon of Henry VIII. the ſtrength, riches, and domains of the old rivals of the kingly power, had, in a great meaſure, fallen into the hands of the crown. The overgrown poſſeſſions of the remaining nobility were gradually ſapped, and diminiſhed, by the operation of that policy, by which the judges, under the cover of a legal fiction, had, in effect, repealed the ſtatute of entails; a ſtatute extorted by the barons, from Edward I. with the vain deſign of perpetuating their grandeur with their eſtates. This policy had been connived at by Edward IV. and Henry VII. and ſoon received a parliamentary ſanction. It was the original ſource of the independence and riches of the People; who were encouraged by the firſt princes of the houſe of Tudor, as an inſtrument, to aid them in the project of annihilating the power of the nobles.

In the mean time, learning and the arts were revived in the Weſt; the two Indies were diſcovered; navigation was improved; commerce cultivated; and opulence univerſally and eagerly purſued. The People ſoon found themſelves in a condition to acquire that property, which common recoveries (now become the law of the land) enabled the nobility to alien. Riches naturally beget the ſpirit of independence: but other more powerful cauſes now co-operated to the ſame effect. Literature and philoſophy had enlightened and enlarged the human faculties. The follies of ſuperſtition, and the

the impoſitions of prieſt-craft, were detected, and attacked with ſucceſs. The reformation of the church could not take place, without affecting the ſtate. Civil liberty was as eagerly ſought after, as freedom of conſcience; and the Commons of England felt and aſſerted their importance. The repreſentatives of the People no longer conſidered themſelves as mere attornies, or agents, paid by their conſtituents, for the ſole purpoſes of beſtowing their property, and of preſenting their humble petitions for the redreſs of grievances. They aſſumed the character of ſtateſmen, politicians, and law-givers; of truſtees charged with the guardianſhip of the property, the liberty, and the lives of a great nation. A ſeat in their houſe was ſoon one of the prime objects of ambition. It was a prize for which many contended at once. Conteſted and litigated elections, therefore, became daily more and more frequent.—But a queſtion now aroſe concerning the judicature, by which they ſhould be tried and determined (I).

The Commons could no longer bear, that the upper Houſe ſhould decide on the right of ſitting in theirs; and they were equally unwilling, that any of the judges of Weſtminſter-hall ſhould exerciſe this juriſdiction, being men, at that time, expoſed to the influence of the Crown, and removeable from their places, if they ſhould be found not ſufficiently ſubſervient to its commands. The chancellor advanced a claim, founded on this technical reaſon, that the parliamentary writ iſſues out of chancery, and is returnable there (K). However, notwithſtanding repeated attempts, at the end of queen Elizabeth's reign, and the beginning of James the firſt's, to draw this power to the court of chancery, the Commons were able to maintain and eſtabliſh the excluſive right of trying controverted elections; and they have enjoyed that right, without interruption, for near two centuries (K).

In the beginning, their determinations were diſtinguiſhed for their wiſdom, purity, and juſtice. The firſt men, for talents and integrity, were ſelected from the body of the Houſe, and, under the name of a committee of privileges, formed a court leſs numerous than

than the whole Houſe, and, on that account, as well as many others, better fitted for the attainment and diſpatch of juſtice. It is impoſſible, on this occaſion, not to mention a late publication, which contains the hiſtory of the proceedings of one of thoſe early committees (1), written by the chairman who preſided in it. Whoever peruſes that little work, muſt regret that it was ſo long with-held from the preſs; for it is equally valuable, on account of the admirable deciſions it contains, and the excellent method purſued by Glanville in reporting them.

This chaſtity of deciſion, however, was not very durable. The united ſtrength of the Crown, and People, having ſubdued the ariſtocracy of the Peers, thoſe two remaining branches of the ſtate began, each, to aim at the excluſive poſſeſſion of the ſovereignty. This ſtruggle between the Crown and the People, was not peculiar to England. It took place, nearly at the ſame time, in many other countries of Europe; particularly in France; where the nobles, after having been equally formidable, had been reduced, by very ſimilar means, and in the ſame manner, as in England. But now the ſucceſs was very different. In France, the King prevailed, and an abſolute monarchy was eſtabliſhed. In England, after ſeveral violent and convulſive efforts, the Commons fixed their independence, as it were, on a rock; yet ſtill left the other two great members of the ſtate, poſſeſſed of large, though limited powers, ſo as to blend the three together, with a harmony more perfect, than the moſt ingenious ſpeculation could invent, or the moſt penetrating wiſdom foreſee.

Yet, even this wonderful ſyſtem, like all human things, was liable, and has been expoſed to abuſe. The Crown entruſted with the executive power, found it impoſſible to carry on the buſineſs of government, without a majority of voices in the Houſe of Commons. The rough attempts of prerogative had proved ineffectual.

(1) Appointed Feb. 23, 1623-4. Journ. vol. i. p. 671, col. 2.

ineffectual. The more winning, and insidious arts of influence were now practised, with better success. The majority and the minority in the House of Commons, became terms nearly synonimous to the friends or opponents of government; and, whenever the party in opposition gained so far in numbers as to form the majority, a subversion of the reigning ministry was the immediate consequence.

It is evident that, in this state of things, it must often have been of consequence, to those in administration, that, in litigated cases, one of the competitors should succeed, in preference to the other. Election causes were now frequently tried at the bar of the House, and, when they were referred to the Committee of Elections, the resolutions of that Committee were to be canvassed, and either rejected, or confirmed by the House (I). A majority there was able to determine any question. The opprobrium and guilt of partiality and injustice seemed to lose their severity, when divided among so great a number; and the cause was generally decided, not in favour of the person who had the merits for him, but of him who had secured the favour of the minister.—To make way for the final determination, when the right of election in a borough had been claimed by different classes of men, it was necessary for the House, first, to declare in which of the contending parties the right, by law, resided; and, there too, the most common rule was to decide, not according to the evidence of the *lex loci*, but in favour of those, who had given their voices to the ministerial candidate.

This, in the course of a few years, produced a great number of illegal, inconsistent, and contradictory decisions. If a whig was a contending candidate, when the whigs were in power, the right of election were declared to be in his friends. If, for the same borough, a new contest arose, under a tory administration, and the tory candidate had the suffrages of a class of men, who had been excluded on the former occasion, the right of voting was then bestowed upon them

them (1). In ſhort, to bring in the favourite candidate, and ſtrengthen the majority, by a new voice, every fence of law, juſtice, and even decency was broken down.

Several attempts were made, at different times, to apply a remedy to this ſcandalous and growing evil (L). Among others, a ſtatute paſſed in the ſecond year of the late King (2), which enacted, that the laſt determination in the Houſe of Commons, ſhould be, to all intents and purpoſes, final, as to the right of election. By this means, ſome check was put to the glaring inconſiſtency of oppoſite determinations. But it was a very inadequate cure. The ſame groſs and avowed partiality continued in the trial of facts; in all caſes where there was no laſt determination of the right of election; and in explaining ambiguous, or ſuppoſed ambiguous, expreſſions, in laſt determinations, where ſuch were to be found.

At the ſame time, there were other unavoidable defects in this judicature. It was too numerous for diſpatch; the judges were not upon oath; and they had no power of adminiſtering an oath to the witneſſes whom they examined. In ſhort, in a country where juſtice is diſpenſed with a degree of wiſdom, purity, and conſiſtency, unparalleled in other ages or nations, there exiſted the moſt imperfect, partial, and inconſiſtent tribunal, which perhaps ever was known in any civilized government.

All wiſe, and all good men lamented the continuance of ſuch a national reproach; but, for a long time, nobody was found, who, with abilities to contrive, poſſeſſed ſpirit and weight ſufficient to carry into execution, a plan for aboliſhing the old, and eſtabliſhing a new judicature; not liable to the defects of the former, but analogous, both in its conſtitution and chaſtity, to the other courts of juſtice. At length, Mr. Grenville imagined, and accompliſhed this

(1) See the caſe of Bewdley, cited infra, in the caſe of Helleſton.

(2) 2 Geo. II. cap. 24.

this great work, though he did not live to enjoy the juſt applauſe, which has, on that account, been laviſhed on his memory. The firſt act eſtabliſhing the preſent mode of trying controverted elections paſſed in 1770 (1), (M) and Mr. Grenville died on the 13th of November of the ſame year.

At firſt, this act was only temporary and limited to ſeven years. But, four cauſes having been tried under it, the juſtice of the deciſions (ſo different from former examples) rendered it almoſt the idol of the public; and in 1774, juſt before the laſt general election, a bill was brought into the Houſe of Commons, and paſſed into a law, which made it perpetual (2).

SECTION II.

Of the Authority of Precedents in Caſes of Controverted Elections.

IN the end of the year 1774, in conſequence of the diſſolution of Parliament, a general election took place; which was the firſt ſince the ſtatute of the 10th of George III. had paſſed. In conſequence of the conteſts which always attend a general election, a number of petitions were preſented to the Houſe of Commons, in the beginning of laſt winter; and they came, of courſe, to be referred to Committees, choſen under that ſtatute. It was then very generally thrown out in converſation, by gentlemen of conſideration, both at the Bar, and in the Houſe, that the deciſions of thoſe Committees would probably, in the progreſs of the ſeſſion, fix and aſcertain many important points of election law, which had continued, hitherto, in a fluctuating and uncertain ſtate. Influenced by the opinion of many perſons, on whoſe judgment he ſets the higheſt value, the Editor of the following collection reſolved to attend thoſe Committees very regularly; and, finding himſelf poſſeſſed of ſufficient

(1) 10 Geo. III. cap. 16.
(2) 14 Geo. III. cap. 15.

ficient leiſure for that purpoſe, he determined to commit to writing, in as faithful and complete a manner as he could, the proceedings in all the different election cauſes. This he hoped might be of uſe to himſelf, to his friends, and perhaps to the public. In the courſe of the ſeſſion, however, this hope was often damped, by many hints which fell, on different occaſions, from gentlemen, in their arguments at the bar, and were adopted by others in private, and much enlarged upon, tending to eſtabliſh a doctrine which would have rendered the labour of this intended compilation entirely nugatory and uſeleſs.

This was no other, than that the proceedings and determinations of one Committee cannot, and ought not to be of any authority, to bind any future Committee, in the trial of ſimilar queſtions: in ſhort, that they are not to be conſidered, in any reſpect, as precedents, in the nature of adjudged caſes in the courts of law. This doctrine he was unwilling to adopt, not merely becauſe it would have fruſtrated what was now become a favourite deſign, but, he believes, for much better reaſons. He thought, that if it prevailed, it would entirely defeat what he looks upon to be, by far, the moſt important object of the new judicature, and indeed of all tribunals of every ſort; in as much as the eſtabliſhment of fixed and invariable rules of law, in which every individual of the commonwealth is intereſted, is of more ſerious conſequence, than the mere deciſion of a particular diſpute between individuals; the main end of all civil polity being, rather to prevent litigation, than to put an end to it when it has ariſen. He was deſirous, however to examine upon what foundation ſo inauſpicious a ſyſtem was built; and the reſult of his reflexions on the ſubject has been, that, to his underſtanding, it is ill ſupported by reaſon, and would be highly inconvenient, and impolitic in its conſequences.

A Committee for trying controverted elections, differs in one reſpect from moſt other courts of Juſtice in this kingdom: becauſe the members of it unite in them the double capacity of judges and jury-men.

They

They are to enquire into facts, as well as to determine the law. Now, as to that part of their proceedings, which may be compared to a verdict at common law, where they declare, upon their oaths, what the facts of the case are, I agree that such declaration can have no binding authority in other cases, or in other Committees. But neither can the verdict of one jury ever bind another. This is an obvious consequence of the nature of the thing. The facts are to be found from the evidence, which is, and must be various, in every different case. Besides, every fact is a specific, individual, distinct thing, different from every other fact. But the evidence of the law does not vary. It is, or ought to be, the same. A rule of law is a general, abstract, permanent maxim, equally applicable to innumerable individual cases; and one court cannot declare it to be different from what another court has determined it to be, without the one, or the other, being in the wrong.

It is therefore only in the character of judges, and as men appointed, upon oath, to declare and expound the law of elections, that I think the members of one Committee are (under certain restrictions) bound to adhere to former decisions of the same questions.

Those who think differently, must build their opinion upon one of two grounds: believing, either, that the reasons, which render precedents of authority in the Courts of Westminster-hall, will not apply to Committees of the House of Commons; or (if they should apply,) that the proceedings and determinations of those Committees, cannot be preserved and reported, in so complete and authentic a manner, as those of courts of law.

On the first of those heads, it will be proper to examine what the reasons are, which give to precedents of cases adjudged in the courts of law, the authority which they undoubtedly possess. "If," says the Commentator on the Laws of England (8), "it is asked "how the general customs or maxims, which form "the

(8) Blackst. Comm. vol. i. p. 69. 4to.

" the law of the land, are to be known, and by " whom their validity is to be determined, the anſwer " is, by the judges, in the ſeveral courts of juſtice. " Judicial deciſions are the principal and moſt autho- " ritative evidence, that can be given, of ſuch a cuſ- " tom as ſhall form part of the common law. It is " therefore an eſtabliſhed rule to abide by former pre- " cedents, where the ſame points come again in liti- " gation; as well to keep the ſcale of juſtice even, " and not liable to waver with every new judge's opi- " nion; as alſo, becauſe the law, in that caſe, being " ſolemnly declared and determined, what before was " uncertain, and, perhaps, indifferent, is now be- " come a permanent rule, which it is not in the breaſt " of any ſubſequent judge to alter, or vary from, ac- " cording to his private ſentiments, he being ſworn " to determine, not according to his own private judg- " ment, but according to the known laws and cuſ- " toms of the land; not delegated to pronounce a new " law, but to maintain and expound the old one."

Now does not every one of thoſe reaſons apply, with equal force, to courts for trying controverted elections? Do they not equally apply to all courts of juſtice, in every free country? They certainly do. And why? Becauſe they are founded, not on any poſitive regulations of the courts of Weſtminſter-hall, nor on any arbitrary written inſtitutions, but on the univerſal and immutable baſis of juſtice, ſenſe, and policy. Indeed, it is an obſervation well warranted by hiſtory, that juſtice has been impartially, and conſiſtently adminiſtered in different countries, and in different tribunals, in proportion to the authority which has been given to former deciſions, in the trial of ſubſequent cauſes. It is that alone, which can keep the ſcale of Juſtice even, and both prevent it from wavering with the different opinions of different judges, and from riſing or falling with their different prejudices, and biaſſes, either of inclination or intereſt. Nay, we may go farther, and ſay, that it is to that, more than any other cauſe, that we owe the admirable uniform ſyſtem of law, which diſtinguiſhes the Engliſh conſtitution

conſtitution ſo much, from that of moſt other countries. To attain the ſame uniformity and conſiſtency in the law of elections, which prevails in every other branch of our law, was, I am perſuaded, one of the great objects of the legiſlature, when they paſſed the ſtatute of the 10th of Geo. III. and therefore it is to be wiſhed, that a doctrine may never be countenanced, either by lawyers, or members of Parliament, which would effectually deſtroy that chief purpoſe of the ſtatute.

But it will be ſaid, that men choſen by ballot, and, therefore, many of them unacquainted with the law, cannot be competent judges of it, and that, conſequently, it would be abſurd, to give, to a deciſion of theirs, equal weight with a ſolemn determination of a court of common law, compoſed of men who have the advantage of the *viginti annorum lucubrationes*, and, by their perſonal knowledge of the deciſions of their predeceſſors, and the *præteritorum memoria eventorum* (9), are enabled to declare what the law is, and has been.

In anſwer to this, in the firſt place, ſome, perhaps, will think, that men of good ſenſe, whoſe minds have been enlarged by education, aſſiſted by the nice diſcuſſion which able Counſel, oppoſed to each other, always give to every litigated queſtion, are nearly as capable of deciding a new point, as men of more practice and experience; and that, with the ſame aſſiſtance, when the point is not new, they will have the precedents laid before them; and will then, in like manner, be equally capable of ſquaring their's with the former determinations. In the mean time, if the deſign of the preſent imperfect undertaking ſhould ſtimulate others, more able than I am, to continue to report the deciſions of ſucceeding Committees, future Committee-men will have themſelves to blame, if they are not acquainted with them. Young members will recur to the experience of the old; and every general election will produce a ſort of public ſchool of election law, where they may, by degrees, become poſſeſſed

(9) Blackſt. Commen. loc. cit.

poſſeſſed of the *præteritorum memoria eventorum*, as much as the judges of Weſtminſter-hall.

In the ſecond place, it is to be conſidered, that many points are, as to the public, indifferent in themſelves, and, therefore, it is not of much conſequence how they are at firſt decided; though it is of the utmoſt conſequence, once they are decided, not to alter them. In Weſtminſter-hall, the judges have been ſo ſenſible of this, that, when points have been determined, in times leſs enlightened, or by judges of leſs liberal minds, than their own, in a manner which they have thought unreaſonable, yet, becauſe they were ſo determined, they have held themſelves concluded, and bound by them. To illuſtrate this, I will mention two remarkable inſtances.

At a very early period, the following rule was eſtabliſhed by the courts of law (1), "That, when in "any deed, conveyance, or ſettlement (and ſoon af-"ter the ſtatute of wills, it was extended to them (2) "an eſtate is given to a perſon for *life*, and in the "*ſame* inſtrument, the remainder, after the determi-"nation of ſuch life-eſtate, is limited to the heirs of "his body, or to his heirs for ever, he ſhall be held "to gain by ſuch deed (or will) an eſtate in tail or in "fee."

It is agreed, that this rule was founded on a direct violation of the intention of the parties; which is the general and moſt rational guide, in the conſtruction of legal inſtruments; it is agreed, that the reaſons for eſtabliſhing ſuch a rule were oppreſſive at firſt; being contrived to ſecure to the lords, the reliefs and other fruits of tenure, which accrued, when an heir *ſucceeded* to his anceſtor by *deſcent*, and which he would not have been liable to, if his father by a limitation, ſuch as has been deſcribed, could have given him his eſtate by *purchaſe*, or, in other words, have conveyed it to him by a ſpecific inſtrument, inſtead of ſuffering it to fall to him, by the operation of the law of ſucceſſion; and

(1) Co. Rep. I. p. 104. a.
(2) Co. Rep. I. p. 66. b.

and it is alſo agreed, that ſuch reaſons no longer exiſt: yet, after all, ſuch is the weight of precedent with the ſages of the law, that in many late caſes, they have, after the moſt ſolemn argument and deliberation, determined, that they cannot over turn the rule, or alter it.

The other inſtance is equally remarkable. By a ſtatute of Queen Elizabeth (3), certain eccleſiaſtical leaſes can only be made for twenty-one years, or three lives, *from the time of making them:* if for a longer term, they are void. Not long after this law paſſed, it was adjudged (4), that if a perſon empowered to make leaſes under the ſtatute, ſhould grant one to commence *from the day of the date*, and ſhould deliver the leaſe on the day of the date (which would therefore be the time of making it) ſuch leaſe would be void; for "*from the day of the date*" was held to be *excluſive* of that day; and conſequently the leaſe was for more than twenty-one years, from the time of making it, and contrary to the power given by the ſtatute. But if ſuch leaſe run thus, "*from the date*," then it would be good; that expreſſion being underſtood to mean from the inſtant of the date, and therefore to *include* the day.—In like manner, when a tenant for life has power to make leaſes for twenty-one years *in poſſeſſion and not in reverſion*, and he uſes the above expreſſion, "*from the day of the date*," in a leaſe, it has been determined that he thereby deſcribes an eſtate to commence *in futuro*, or in *reverſion*, and conſequently beyond the power; that is, if the leaſe be delivered on the day of the date, which is always preſumed, unleſs the contrary appear (5). I myſelf have heard the great perſon, who is now at the head of the common law, ſay, more than once, that he, and the other judges, lamented, that ſo narrow and illiberal a conſtruction had ever prevailed, ſeeing that, in common parlance, "*from ſuch a day*," may either be *incluſive* or *excluſive* of that day, and that, in the caſes juſt mentioned, the parties muſt be preſumed to have meant what they were entitled to do, and therefore to include the day; but, he added, that the point having been ſettled by former judgements, they could not now depart from it.

Theſe

(3) 13 Eliz. cap. 10.
(4) Bacon's Abr. Title *Leaſes*, p. 340, 341.
(5) 2 Inſtit. 674.

Theſe two examples, among innumerable others, prove how concluſive precedents are in the courts of common law, and how unwilling the judges are to break through the uniformity of deciſion, even where they diſapprove of the original determination. And what reaſon can be given for their ſcrupulous adherence, in ſuch caſes, to what has been done by their predeceſſors, which will not, in ſimilar inſtances, apply to election Committees, and every court of juſtice?

Indeed, I think it may be fairly aſſerted, that the legiſlature itſelf, by the ſtatute of the 2d of Geo. II. (6) has declared and eſtabliſhed the authority of precedents, in matters of election law. For what is the meaning of making the laſt determination of the Houſe final? Is it not ſaying, that an adjudged point (however improperly determined at firſt) ſhall be concluſive, and binding, in all ſucceeding caſes? And this too regards the moſt important of all points, that could come before the Houſe in its judicial capacity, viz. the right of election. It is probable that, ſince the late act paſſed, there will be few, or no determinations of the Houſe on that right, in places which ſtill continue what are called maiden boroughs; for ſuch determinations can hardly be made, unleſs in conſequence of a ſpecial report on the ſubject, from a Committee to the Houſe; and ſpecial reports ſeem to meet with ſo little encouragement, that one may venture to foretell that they will not be very frequent. But, this being the caſe, ought not Committees to give the more particular weight to reſolutions and deciſions of preceding Committees, on queſtions concerning the right of election, as the only means now left of preſerving the ſpirit of the ſtatute of Geo. II. which otherwiſe will be loſt, with all its advantages, and, in a manner repealed, by the 10th of Geo. III. as far as concerns the maiden boroughs juſt mentioned; though ſurely nothing was farther from the intention of the perſon who imagined that act, or of the Parliament that paſſed it?

Having endeavoured to prove that precedents ought to bind Committees of elections, in their deciſions, this doctrine

(6) 2 Geo. II. cap. 24. § 4.

doctrine will not at all be impeached by what I am ready to acknowledge, that their authority is, and ought to be, ſubject to many qualifications and reſtrictions. They muſt not be *flatly unjuſt or abſurd* (8); they muſt be deciſions of points immediately before the court, and abſolutely neceſſary to the determination of the cauſe; they muſt not be haſty opinions, formed, and adhered to, before the queſtion has been argued by the Counſel on both ſides; they will have moſt weight when agreeable to general principles, and conſonant to other determinations; a ſucceſſion of ſimilar deciſions will, as they accumulate, give a growing authority to the firſt adjudication; and a point ſo confirmed will be much more irreſiſtible than the firſt judgment of a Committee, acting in the infancy of this new tribunal; finally, there is no doubt, but that the comparative learning and merit of the majority of thoſe who compoſe different Committees, will reflect a comparative luſtre and credit on their reſpective proceedings; in like manner, as a deciſion of a Coke, a Hale, or a Holt, carries with it a ſort of authority much more forcible than that of more obſcure, or leſs virtuous judges.

The ſecond head of objection to the authority of precedents in election caſes is, that their hiſtory cannot be preſerved in a manner equally complete and authentic with that of the caſes decided in the courts of common law. But that there is not much foundation for ſuch an opinion, will appear, by conſidering the nature of our law-reports, which (next to the ſtatutes of judicial records) are of the greateſt authority in Weſtminſter-hall.

In every cauſe tried and determined at law, there are certain formal technical proceedings, called Pleadings, which muſt always uſher in the cauſe, and ripen it, either for the determination of a jury, and the judgment of the court, or, if no queſtion of fact ariſes, ſimply for the judgment of the court. Theſe pleadings, together with the verdict and judgment, are preſerved on record; and they, ſo far as they go, are of ſo high a nature, that nothing can be given in evidence to contradict them.

(8) Blackſt. Comm. vol. i. p. 70. 4to.

them. But we ſhould be very much at a loſs indeed, if we knew nothing more of former deciſions, than what they teach us. Unleſs where there has been a ſpecial verdict, the facts, on which any queſtion of law aroſe, do not appear; and, except in caſes of demurrer, the queſtions of law are not ſtated in the record: ſo that in a thouſand inſtances, the ableſt pleader would find it difficult, or impoſſible, to decypher, by a peruſal of the record, what the point of law was, which the court determined, and on which the cauſe turned.

To ſupply this deficiency, therefore, it has been an uninterrupted practice, at leaſt ever ſince the reign of Edward II. (9) for certain perſons who attend the courts, to commit to writing, as accurately as they can, the ſtate of every remarkable caſe, the points of law ariſing upon that caſe, the arguments of counſel, and the deciſion of the court. Formerly, this was done officially, by the principal clerks of the court (1); but, ever ſince the reign of Henry the VIII. it has been left to the diſcretion of any individual, who might find himſelf diſpoſed to take the taſk upon him: and the conſequence of this has been, that our reports, ſince that reign, have been compiled by people of different deſcriptions; judges, gentlemen of the bar, or clerks in court. Till of late years indeed, it has been cuſtomary, when a collection of reports was publiſhed, to obtain a ſort of atteſtation of the Chancellor, and the twelve Judges of England, to be prefixed to them. But this only contained the teſtimony of the Judges to the abilities of the reporter. It neither expreſſed, nor implied, any knowledge they had of the authenticity of the reporters; nor were they at all ſuppoſed to have examined, or peruſed the work. This idle ceremony has, therefore, in ſome recent inſtances (2) been dropt, and the merit of reports now reſts oſtenſibly, as, in ſubſtance, it always did, on their own intrinſic merit, and the internal evidence of their accuracy

Why

(9) Blackſt. Comm. vol. i. p. 72, 4to.

(1) Blackſt. l. c.

(2) See the Prefaces to Mr. Juſtice Foſter's Reports, and to Sir James Burrow's Reports.

Why then cannot an individual, who attends the proceedings in an election-cauſe, and who commits them to writing in the Committee-room as they take place, give as compleat a hiſtory of that cauſe, as the ſame individual could of a cauſe in a court of common law? If there is any difference, he certainly may execute the former taſk better than he could the latter; firſt, becauſe the cauſes being in general much longer, and the ſame arguments and facts often repeated, he has more opportunities of ſetting right any miſtakes he may have made; and, ſecondly, becauſe, in Committees, the evidence is taken down in writing, by a ſworn clerk, and copies of the minutes are always given, if deſired, to the agents, ſo that the greateſt authenticity may, if neceſſary, be attained as to the facts.

The only material difference is this, and, it muſt be owned, that it is a great one. In the courts of law, the judges deliver their opinions, or, when they are unanimous, the Chief Juſtice delivers the opinion of the court, or the reaſons on which the judgment is formed. It is to be wiſhed that this were practiſed by Committees. But in the mean time, it muſt be obſerved, that not all the reaſons thus given by a judge for a judgment, but only ſuch as follow, *ex neceſſitate*, from the compariſon of the deciſion with the ſtate of the caſe, are binding in ſucceeding caſes. A judge ſometimes, in delivering an opinion, travels out of the ſubject, and falls into vague reaſoning, deciding extrajudicially queſtions not before him; and I believe it is underſtood that, though, when the judges are unanimous, the Chief Juſtice delivers the opinion of the court, yet the other Juſtices are not preſumed to adopt and concur with every doctrine that falls from him, in the courſe of that opinion. Now it is evident that in election caſes, as well as in cauſes tried at common law, by comparing the determination with the ſtate of the caſe, we may diſcover what points were neceſſarily decided. Laſtly, from the length of time employed in moſt election cauſes, it is poſſible to have the arguments of counſel on both ſides, at more length, than we can in caſes determined at Weſtminſter-hall; and, when they are fully reported, it is fair to conclude,

as is done with regard to caſes decided in the Houſe of Lords, that the judgment went upon ſome of the reaſons ſuggeſted by the advocates for the ſucceſsful party.

Having ſaid ſo much in favour of the reports which *might* be made of election cauſes, it is with ſome confuſion that I contemplate the following collection, of whoſe deficiencies, I am ſure, I am at leaſt as ſenſible as any of thoſe can be, who may have occaſion to conſult it. It will in the mean time be proper to mention, that, for the moſt part, I attended the Committees myſelf through the whoſe courſe of their proceedings, except where two, or more, were ſitting at once, or where the cauſe was merely an enquiry into diſputed facts, and, as it were, a congeries of *niſi prius* cauſes. As to ſuch caſes, though, for the ſake of mentioning every one that was tried during the ſeſſion, I have inſerted them; yet, as they did not turn upon queſtions of law, I took no pains to give a full hiſtory of them, but have only preſerved the general heads, together with the event, and any points of evidence which I thought deſerved to be remembered. When any accident happened to prevent my attendance, I had often the good fortune to receive from the beſt authority, (that of the counſel on both ſides) an account of the queſtions and arguments. Indeed, if there is any degree of merit in any part of this work, it is greatly owing to the moſt ready communication of papers and notes, which I received from ſome of my friends at the bar.

Where the whole cauſe turned upon a mere queſtion of law, I have been careful to ſtate it, as nearly as I could, in the very words in which it was ſtated by the counſel. Where the queſtion of law aroſe out of admitted facts, I have tranſcribed thoſe facts from the paper containing them, given in to the Committee, by conſent. Where it ſeemed proper to report the facts, and they were not agreed upon, but proved by evidence, I have from the mouth of the witneſſes, taken down what they proved, with a ſcrupulous intention (at leaſt) of being accurate; and in ſeveral inſtances, I have had an opportunity of comparing my notes with the minutes of the clerk. Where the Committee, by a formal reſolution,

ſolution, determined any preliminary point, I have moſt commonly given that reſolution in the very words of the chairman.

I have examined every reference to the Journals in the original, without truſting, in a ſingle inſtance, either to Carew, or the octavo book on the law of elections; and I have tranſcribed all the laſt determinations, as well thoſe concerning the places where the preſent cauſes aroſe, as thoſe which were cited in argument, with the moſt punctilious attention; and the caſes in the Journals, which were either mentioned at the bar, or which appeared to me ſo appoſite to the illuſtration of the caſe which I was reporting, as to deſerve being inſerted in the notes ſubjoined to that caſe, I have alſo tranſcribed with the ſame exactneſs.

In the account of the arguments of counſel, I have thought it moſt conſiſtent with my deſign, to give all thoſe on one ſide together, without diſtinguiſhing thoſe of the different counſel, becauſe there muſt, of neceſſity, be a degree of repetition when two people ſpeak largely on the ſame ſubject. For a ſimilar reaſon I have frequently intirely omitted the replies.

To conclude, it is proper to warn the reader (though it will probably occur of itſelf) that the arguments of counſel, contained in the following reports, are not to be conſidered as their private opinions on the different queſtions; but merely as topics, furniſhed by the learning and ingenuity of advocates, in behalf of their clients. On this ſubject I am ſure all the gentlemen at the bar will be ready to adopt the words of Cicero, in his oration for Cluentius. *Sed errat vehementer, ſi quis in orationibus noſtris, quas in judiciis habuimus, auctoritates noſtras conſignatas ſe habere, arbitratur* (3).

SECTION III.

Of the Conſtitution of Committees for trying controverted Elections, and the Manner of proceeding in them.

EVERY court of juſtice has a peculiar conſtitution, which it derives, in part, from its original inſti-

 tution,

(3) Pro Cluent.

tution, and, in part, from its eſtabliſhing for itſelf, ſuch rules and forms of procedure, as are found moſt ſuitable to the nature of the buſineſs, which comes before it. The mode of forming Committees of election has many ſingularities in it, which embarraſs thoſe who are not much accuſtomed to the peruſal of ſtatutes, by an appearance of intricacy; and the mode in which cauſes are carried on, in thoſe Committees, differs, in ſeveral reſpects, from the practice of Weſtminſter-hall. For theſe reaſons, it may be uſeful to give, in this place, a diſtinct view of both. Of the one, by moulding together the two acts of the 10th and 11th of the preſent King, and diveſting them of the ſuperfluities of ſtatutory language; and of the other, by digeſting thoſe forms which all the Committees, that ſat laſt winter, adopted, with regard to the method in which counſel are to proceed at the bar, the examination of witneſſes, and the reports of the Houſe.

Some, perhaps, will, at firſt view, think that I have, on thoſe ſubjects, entered into too minute a detail. But they will probably alter their opinion, if they reflect on the difficulties and confuſion, which the ignorance, or neglect, of form and order, ſo often occaſion in the conduct of buſineſs.

I. By an order of the houſe (4) renewed at the beginning of every new ſeſſion, every petition complaining of an undue election, or return, muſt be preſented within fourteen days after the date of that order, and ſo within fourteen days next after any new return ſhall be brought in (N).

II. If the Houſe is not actually ſitting on the laſt day of the fortnight limited by the abovementioned order, by an equitable conſtruction it has been determined to be ſufficient, that the petition be preſented on the firſt day when the Houſe ſits after the expiration of the fortnight (O).

III. No ſuch petition can be taken into conſideration till fourteen days after the beginning of the ſeſſion in

(4) Votes, 5 Dec. 1774, p. 5.

in which it is preſented, nor till fourteen days after the return to which it relates, ſhall be brought into the office of the clerk of the crown (5).

IV. It was reſolved by the Houſe, in the beginning of the laſt ſeſſion, that according to the true conſtruction of 10 Geo. III. whenever a petition ſhall be offered to be preſented within the time limited, it ſhall be delivered in at the table, and read, without a queſtion being put upon it (6).

V. By a reſolution of the Houſe, renewed at the beginning of every ſeſſion, in all caſes of controverted elections for counties, in England and Wales, the petitioners, by themſelves, or their agents, muſt, within a convenient time, to be appointed by the houſe, deliver, to the ſitting members, or their agents, liſts of the voters for the ſitting members to whom they intend to object, in which they muſt ſtate the ſeveral heads of objection, oppoſite to the names of the perſons objected to; and the ſitting members, or their agents, muſt deliver, within the ſame time, ſimilar liſts to the petitioners or their agents.(7) (P).

VI. A great many petitions having been offered to be preſented at the ſame time, in the beginning of the laſt ſeſſion, the Houſe reſolved, that whenever more than one petition, complaining of an undue election, or return, for the ſame, or for different places, ſhall at the ſame time be offered to be preſented to the Houſe, the Speaker ſhall direct all of them to be delivered in at the table; and that the names of the counties, cities, boroughs, or places to which they relate ſhall be written on ſeveral pieces of paper of an equal ſize, which are to be rolled up, and put by the clerk into a glaſs, or box, and then publicly drawn by the clerk, and the petitions read in the order in which the names are drawn (8).

VII. When

(5) 11 Geo. III. cap. 42. § 2.
(6) Votes, 6 Dec. 1774, p. 12.
(7) Votes, 5 Dec. p. 5.
(8) Votes, 6 Dec. p. 18.

VII. When a petition is read, a day and hour are appointed for taking it into conſideration.

VIII. The Houſe may alter the day appointed for conſideration of any petition, and appoint a *ſubſequent* day, giving notice to the parties (9).

IX. Before the ſtatute of 10 Geo. III. an annual order was always made for proceeding firſt to the conſideration of petitions concerning double returns (Q). The order has not been renewed ſince; however, laſt winter, this preference was ſhown to the petitions from Milborne-Port, and Morpeth, the firſt relating to a double return, and the ſecond complaining of a falſe return. They were read, and days appointed for the conſideration of them, before the ballot for the others (1).

X. When the time for taking any petition, or petitions, into conſideration is appointed, an order is made for the Speaker to iſſue his warrants for ſuch perſons, papers, and records, as ſhall be thought neceſſary by the ſeveral parties, on the hearing of the matter of ſuch petitions (2).

XI. On the day appointed for the conſideration of any petition, or petitions, the Houſe cannot previouſly enter on any other buſineſs, except the ſwearing of members (3); and, if there are not one hundred members preſent, the Houſe muſt adjourn to the following day, (unleſs it be Sunday or Chriſtmas-day) and ſo on from day to day, till the requiſite number of an hundred are preſent (4). There has been but one inſtance hitherto, where an adjournment has been neceſſary on this account, viz. in the caſe of Clackmannanſhire (5).

XII. When the hour appointed for taking any petition into conſideration is come, the ſerjeant at arms is directed by the Speaker, to go, with the mace, to the

(9) 10 Geo. III. c. 16. § 3.
(1) Votes, 6 Dec. p. 18.
(2) Loc. cit.
(3) 11 Geo. III. cap. 42. § 4.
(4) 10 Geo. III. cap. 16. § 4.
(5) Vide infra Caſe XXI.

the places adjacent, and require the attendance of the members, on the buſineſs of the Houſe (6).

XIII. If the number is complete, the council and agents for the parties attend at the bar, and the doors of the Houſe being locked, the names of all the members written on diſtinct pieces of paper, are put, in equal number, into ſix glaſſes, and the clerk draws out a name alternately from each glaſs, which is delivered to the Speaker, and read by him; and ſo on till forty-nine names of members then preſent are drawn (7).

XIV. If the name of any member is drawn who has voted at the election complained of, or of one who is either a petitioner, or petitioned againſt, or whoſe return has not been fourteen days in the office of the clerk of the crown, or of one not then preſent, his name is ſet aſide, and does not go to make up the number of forty-nine (8).

XV. If the name of any member is drawn, who will make oath that he is ſixty or upwards, or verify upon oath any other excuſe which the Houſe ſhall approve of, or who has ſerved upon any other Committee in the courſe of the ſeſſion, he (if he requires it) is excuſed, and another name drawn in his ſtead (9); and ſo it is if the member's name is drawn who is intended for the nominee of either of the parties (1).

The form of the oath by which any excuſe is to be verified is as follows. "The matter alledged by you, and "now taken down and read, as an excuſe for not ſerving "on this Committee, is the truth, So help you God (2)."

XVI. But the excuſe of having ſerved on a former Committee, during the ſeſſion, cannot be allowed, if the Houſe ſhall have come to a previous reſolution, that the members who have not ſerved is inſufficient to anſwer the purpoſes of the ſtatute. And no member, who, after having been choſen to ſerve on a former Committee, has, from inability or

(6) 10 Geo. III. cap. 16. § 4.
(7) 10 Geo. III. cap. 16. § 5.
(8) Ibid. § 6.
(9) § 8, 10.
(1) 10 Geo. III. cap 16, § 15.
(2) 11 Dec. 1770. Journ. vol. xxiii. p. 59. col. 1.

or accident, been excuſed from attending it throughout, can avail himſelf of ſuch excuſe (3).

XVII. If the number of forty-nine, not ſet aſide, nor excuſed, cannot be completed, the Houſe muſt adjourn in the ſame manner as in the caſe where there are not an hundred preſent (4).

XVIII. When there are but two diſtinct parties, the petitioner, or petitioners, and the ſitting member, or ſitting members, name each one from among the members there preſent, who are not of the forty-nine (5).

XIX. If either of the parties, or both, decline their right of nominating, the want of ſuch nomination is ſupplied by drawing the name of one or two members in the ſame manner as the forty-nine are drawn (6).

XX. The two nominees (for they are generally ſo called even in the latter caſe, though improperly) are liable to the ſame objections, and entitled to the ſame excuſes, as thoſe drawn by lot; and in caſe of ſuch objections, or excuſes, others are to be nominated in their ſtead (7).

XXI. The doors of the Houſe are then opened; two liſts of the forty-nine are prepared, one of which is delivered to the counſel for the petitioners, and the other to the counſel for the ſitting members; the parties, with their counſel and agents, withdraw, together with the clerk of the committee; and the parties ſtrike off, alternately, one from the liſt of the forty-nine, (the petitioners beginning) till the number is reduced to thirteen. This muſt be done within an hour (8).

XXII. Then the thirteen, together with the two nominees, take the following oath, which is adminiſtered at the table by the clerk, in the ſame manner as the oaths of ſupremacy and allegiance are (9).

"You, and each of you, ſhall well and truly try the "matter of the petition of A. B. referred to you, and a "true

(3) 10 Geo. III. cap. 16. § 8.
(4) 11 Geo. III. cap. 42. § 3.
(5) 10 Geo. III. c. 16. § 11.
(6) § 15. (7) § 12.
(8) 10 Geo. III. § 13. (9) § 29.

" true judgment give, according to the evidence. So help " you God (1).

XXIII. The Houſe then appoints a certain time for the meeting of the Committee, which muſt be within twenty-four hours, and is generally forthwith; and none of the fifty-one muſt leave the houſe till that time is fixed (2).

XXIV. When there are more than two parties before the Houſe on diſtinct intereſts, each of the parties ſtrikes off one ſucceſſively from the forty-nine, till the number is reduced to thirteen, the order of their beginning being determined by lot, after they withdraw from the bar (3).

XXV. In ſuch caſe, none of the parties appoint a nominee; but, as ſoon as the liſt of the thirteen is given into the Houſe, they (the thirteen) withdraw, and within an hour chooſe two members preſent at the ballot, whoſe names have not been previouſly drawn; and, if they are not ſet aſide, or excuſed, on the grounds already mentioned (XIV. XV.) the fifteen are ſworn in the manner above deſcribed. XXII. (4).

XXVI. In ſuch caſe too, none of the members preſent at the ballot, are to depart from the Houſe, till the time for the meeting of the Committee is appointed (5).

XXVII. Both before the Houſe of Commons, and the Houſe of Lords, and in all Committees of either, one party can have but two counſel (R). When there is but one petitioner, or when there are two, and they unite in the ſame petition, they have but two counſel. And, in like manner, when the election of two ſitting members is complained of on the ſame grounds, they have only two counſel.

XXVIII. In moſt caſes there is a ſeparate petition from certain electors, or perſons claiming a right to vote, in the intereſt of the unſucceſsful candidate. They are ſometimes allowed one counſel (6); but they are not conſidered as diſtinct parties, ſo as to be entitled to ſtrike off any names from the forty-nine (7).

XXIX.

(1) § 13. Journ. vol. xxxiii p. 59. col. 2. 11 Dec. 1770.
(2) 10 Geo. III. § 13, 14.
(3) 11 Geo. III. c. 42. § 6. (4) § 6. (5) § 7.
(6) As in the caſes of Downton and Bedford.
(7) 11 Geo. III. cap. 42. § 6.

XXIX. When there are two petitioning candidates, who preſent diſtinct petitions, containing different allegations, each of them is entitled to two counſel, and the Committee is formed as deſcribed XXIV. XXV.

XXX. If the caſes and intereſts of the two ſitting members are diſtinct, each of them likewiſe is allowed diſtinct counſel, and the Committee is formed in the ſame manner XXIII. XXIV. (8) (S).

XXXI. When the Committee meets at the time appointed by the Houſe, they elect one of the thirteen, who were choſen by lot, to be their chairman; and in caſe of an equality of voices, the member who was firſt drawn has a caſting vote at this election of a chairman; and there is a ſimilar proviſion if, in the courſe of a cauſe, from the death or abſence of the firſt, there ſhould be occaſion to elect a new one (9). This is all the buſineſs which is done that day, after which the Committee adjourns till the next, commonly at ten o'clock, and continues ſitting every day from ten to about three.

XXXII. They meet every day, except on ſundays, and Chriſtmas-day, and cannot adjourn for more than twenty-four hours, excluſive of ſunday, or Chriſtmas day, without leave obtained from the Houſe, on motion, and ſpecial cauſe aſſigned for a longer adjournment (1).

XXXIII. No member can abſent himſelf without leave obtained from the Houſe, or an excuſe allowed on ſpecial cauſe verified upon oath (2). If any one does, the chairman muſt report it to the Houſe, who will direct the Committee to proceed without him; and he is ordered to attend, and taken into the cuſtody of the ſerjeant at arms, and otherwiſe puniſhed at the diſcretion of the Houſe, unleſs it ſhall appear, by facts verified upon oath, that his abſence was occaſioned by ſudden accident or neceſſity (3).

XXXIV. The Committee can never ſit on any day, until thoſe members are aſſembled, who have not been excuſed; and

(8) See the caſes of Hindon, Briſtol, and Dorcheſter.

(9) 10 Geo. III. cap. 16. §. 17.

(1) §. 19. (2) §. 21. (3) §. 22. See the proceedings in the Houſe on the abſence of Mr. Grey, in the caſe of Downton. See alſo the caſe of Hindon.

and if they do not all meet within an hour of the time to which the Committee adjourned, they muſt adjourn again; the chairman reporting the cauſe of ſuch adjournment to the Houſe (4).

XXXV. If more than two members are abſent, whether on leave, or not, the Committee muſt adjourn from time to time, until thirteen are preſent (5).

XXXVI. In caſe the number of the members be reduced unavoidably, by death or otherwiſe, under thirteen, and continue ſo doing three ſitting days, *that* Committee becomes *ipſo facto* diſſolved, and all its proceedings void; and a new Committee muſt be choſen (6).

XXXVII. If the Committee have occaſion to make any application, or report to the Houſe, in relation to adjournment, abſence of members, or non-attendance or miſbehaviour of witneſſes (vide infra XLIII.) and the Houſe ſhall be then adjourned for more than three days, the Committee may adjourn to the day appointed for the meeting of the Houſe (7).

XXXVIII. The Committee have power to ſend for perſons, papers, and records. They are to examine all the witneſſes who come before them upon oath, and to try the merits of the return, or the election, or both (8).

XXXIX. The regular method of conducting every cauſe, ſeems to be this.—The petition, or petitions being read, if the right of election be in diſpute, and there is a laſt determination of the Houſe, that too is read, and then the ſtanding order of Jan. 16. 173$\frac{5}{6}$ (9).

After this, the ſenior counſel for the petitioners opens their caſe, ſtating what facts they mean to prove, and the points of law they mean to rely upon.

The evidence to prove the caſe of the petitioners is then gone into, whether written, or oral, and the following oath is adminiſtered to every witneſs.

"The evidence you ſhall give to this Committee ſhall be "the truth, the whole truth, and nothing but the truth. So "help you God."

If

(4) §. 21. (5) §. 23. (6) §. 24.
(7) 11 Geo. III. cap. 42. §. 5.
(8) 10 Geo. III. cap. 16. §. 18.
(9) See the Caſe of Milborne Port.

If the examination of a witneſs laſts more than one day, or if the ſame witneſs is called more than once on different days, the oath is always adminiſtered, anew, every day.

When a witneſs is under examination, all thoſe who are intended to be called afterwards on either ſide, are ordered to withdraw; after which, if they remain in the Committee-room, their evidence will not be received.

In examining a witneſs, one of the counſel, who calls him, begins. He is then croſs-examined to the ſame facts by the counſel on the other ſide, and alſo to any other matter which he thinks of uſe to the cauſe of his clients. Then the counſel who began the examination, re-examines him to the new matter ſuggeſted by the other ſide, to which the re-examination muſt be confined. The members of the Committee then put ſuch queſtions as occur to any of the counſel of either ſide, as they cannot then regularly put them themſelves, they ſuggeſt them to one of the members of the Committee, who aſks them of the witneſſes.

The evidence for the petitioners being cloſed, the junior counſel on that ſide ſums it up, and draws his concluſions from it, againſt the ſitting members, and in favour of his own clients.

Then the ſenior counſel for the ſitting members, after remarking upon the evidence which has been produced, and endeavouring to impeach its validity, or the concluſions drawn from it, proceeds to open the caſe againſt the petitioners (if there are objections either to their eligibility, or to their votes.) Evidence is called to ſupport this new caſe, which is gone through in the manner juſt deſcribed. Then the junior counſel, on the ſame ſide, ſums it up, and the ſenior counſel for the petitioners replies to the whole.

When there is only one petitioner, and two ſitting members, or one petitioner, and one ſitting member, the order of the proceeding is of courſe the ſame in every reſpect.

XL. When the counſel have cloſed their evidence, and arguments, they are directed to withdraw, and, the court being cleared (T), the Committee ſettle their opinion among themſelves; determining any point on which they differ, by the majority of voices. If the voices are equal, the chairman has a caſting vote (1).

XLI. Though

(1) 10 Geo. III. cap. 16. §. 27.

XLI. Though the eſtabliſhed method ſeems to be, that the counſel for the petitioners begin by opening the whole of their caſe, yet, when it happens to conſiſt of ſeveral queſtions, and the determination of one would render the diſcuſſion of the others unneceſſary, (as, for inſtance; if the objections to a ſitting member are, firſt, that he was not eligible, and, ſecondly, that he had not the majority of legal votes) (U) the Committee will then, with the conſent of the parties, divide the caſe into the ſeparate queſtions (2). The proceedings on each ſeparate queſtion are exactly in the manner which has been deſcribed (XXXIX). When the Committee have come to a reſolution, upon ſuch diſtinct queſtion, the counſel being called in, it is read to them by the chairman. When the determination of the firſt queſtion is ſufficient for the deciſion of the cauſe, the others are not proceeded upon.

XLII. If during the courſe of the evidence, any objection is taken to the admiſſibility of any part of it, both the counſel, on the ſide from whence the objection comes, ſpeak to it, and being anſwered by both the counſel on the other ſide, the ſenior replies; and then, if there appear to the Committee any difficulty on the ſubject, the court is cleared, and the counſel, when they are called in again, receive from the chairman the directions of the Committee, whether the evidence is to be admitted, or rejected.

XLIII. If any perſon, ſummoned as a witneſs before the Committee, prevaricate, or miſbehave, in giving or refuſing to give evidence, the chairman, by the direction of the Committee, may, at any time, during the courſe of the cauſe, report this matter to the Houſe, for the interpoſition of their authority or cenſure (3) (V.)

XLIV. The report of the Committee, containing their determination, whether the petitioners, or ſitting members, or either of them, are duly returned, or elected, or whether the election is void, is concluſive between the parties, and binding on the Houſe (4). And it is of courſe ordered to be entered

(2) See the caſes of Briſtol, Dorcheſter, Bedford, Lanerk, and North Berwick.

(3) 10 Geo. III. cap. 16. §. 26.

(4) §. 18.

entered in the Journals, and directions are given for the neceſſary alteration of the return (W) or for iſſuing a new writ, as the caſe requires.

XLV. If the Committee come to any reſolution beſides the determination juſt mentioned, they may, if they think proper, report it to the Houſe, at the ſame time that their chairman communicates ſuch their determination. But as to ſuch ſpecial reſolution, the Houſe is left at liberty either to diſagree with, or confirm it (5).

(5) §. 25. See the Caſes of Hindon and Shafteſbury.

NOTES

NOTES.

Page 1. (A) IN the year 1026, the emperor Conrad the Salic, in an aſſembly of the ſtates of Lombardy, at Roncaglia, promulgated the firſt written law concerning feudal ſucceſſions. Though in their origin, fiefs were held during the pleaſure of the donor, and were afterwards firſt annual, and then for life, yet before that period, they deſcended to the ſons, with the approbation of the lord. But hitherto ſuch deſcent had been merely conſuetudinary. In the above-mentioned year, by a written conſtitution it was eſtabliſhed, on the petition of the vaſſals, that the right of ſucceſſion ſhould extend to grandſons by ſons, and failing them to brothers. In 1033, or 1037, Lotharius II. (otherwiſe called the Third) extended the ſucceſſion to paternal uncles. Craig (as well as many foreign feudiſts) has committed a groſs anachroniſm, in aſcribing this laſt mentioned law to Lotharius I. grandſon to Charlemagne, who died in the year 855. Giannone Iſtor. di Nap. tom. ii. lib. 9. cap. 1. In ſome countries on the continent the feudal ſucceſſion at this day, does not go beyond a certain number of degrees.

P. 2. (B) Prynne was of opinion that, before the ſtatute of 8 Henry VI. cap. 7. " every inhabitant and commoner in each " county, had a voice in the election of knights, whether he " were a freeholder or not." Brevia Parliam. rediviva, p. 187. But he gives no authorities for this opinion, which does not ſeem to have been adopted by any body ſince.—In the caſe of Aſhby and White, as reported by lord Raymond, Lord Ch. J. Holt ſays, " Before the ſtatute of Henry VI. " any man " that had a *freehold*, though ever ſo ſmall, had a right of voting in counties." Lord Raymond, p. 950.

P. 2. (C) The different inſtances of parliamentary boroughs created, or revived, as well by the crown, as by act of parliament, previous to the reign of Charles II. are collected in one of lord Somers' State Tracts, and may be ſeen at the end of the preface to Glanville's Reports. In that reign, before the caſe of Newark happened, the prerogative of the King, in this reſpect, was called in queſtion. Prynne in his Brevia Parliam. rediviva, though one of his great objects in that book ſeems to have been to raiſe the prerogative, and depreſs the authority of the Houſe of Commons, ſays, p. 156, 158, " that he is clear, " that ſince the ſtatutes of 5 Richard II. cap. 4. 1 Hen. V. cap. " 1. and

" 1. and 23 Hen. VI. cap. 25. no boroughs can be *created* (or " revived) but by ſpecial acts of parliament, ſuch as thoſe of " the 27 Hen. VIII. cap. 26. 34 Hen. VIII. cap. 18. and 35 " Hen. VIII. cap. 11. which enabled and authorized the " Welſh ſhires, cities, and boroughs, and the county and " city of Cheſter, to ſend knights and burgeſſes to parliament." See alſo p. 238. b. Whitelock, on the contrary, in his Commentary on the Parliamentary Writ, admits the power of the Crown. " The King," ſays he, " may give *by patent*, to as " many towns as he pleaſes, the privilege of ſending burgeſſes " to parliament." Vol. ii. cap. 103. p. 372. See alſo the ſame author, vol. i. p. 500. as cited in the caſe of Pontefract. It is obſervable, that both thoſe works are dedicated to Charles II. In the caſe of Newark, the queſtion was diſcuſſed in the Houſe. The debate aroſe on the occaſion of a petition of Mr. Henry Saville, who had been elected, under the new charter, for that place. Journ. vol. ix. p. 389. col. 1. 21 March, 1676-7. Three objections were taken to the charter, Firſt, it was ſaid, that the King had not the power at all: ſecondly, that, if he had, ſtill he could not limit the right of election to a partial number of the members of the corporation, which had been done in that caſe; and thirdly, that he could not grant ſuch a charter while the parliament was ſitting. A. Grey's Debates, vol. iv. p. 297, to 304. The queſtion being put, " That, by " virtue of the charter granted to the town of Newark, the " town of Newark hath right to ſend burgeſſes to parliament," on a diviſion it paſſed in the affirmative 125 to 73. Journ. loc. cit. This caſe ſeems to have confirmed and eſtabliſhed the prerogative of the King, although it was never afterwards exerciſed. After the Revolution it is recognized by Lord Holt, in the famous cauſe of Aſhby and White already cited (Note B). His words are, " When the right of election is *granted* within " time of memory, it is a franchiſe that can be *given* only to " a corporation," and a few lines afterwards, adopting the words of the judges in the caſe of Dungannon, (cited *infra* in that of Poole,) " If the King grant to the *inhabitants* of Iſling- " ton, to be a free borough, and that the burgeſſes of the ſame " town may elect two burgeſſes to ſerve in parliament, ſuch a " grant of ſuch privilege to burgeſſes not incorporated is void; " for the inhabitants have not capacity to take an inheritance." He therefore did not doubt of the King's power to grant the privilege in queſtion to a borough properly incorporated. The caſe of Aſhby and White happened before the Union. Since that time, it ſeems to be underſtood, that the King cannot beſtow a new right of ſending members to parliament. By the treaty

treaty of Union, Art. XXII. there can be only forty-five members for Scotland, in the Houſe of Commons. To encreaſe the number of members for England above five hundred and thirteen, of which the Houſe conſiſted at that period, would be to alter the proportional ſhare of the nation in the legiſlative body, which proportion is one of the moſt important parts of the contract between the two kingdoms.

P. 3. (D) For inſtances of the arbitrary authority aſſumed by the ſheriffs with regard to the elections and returns for boroughs within their counties, ſee Prynne's Brevia Parliam. rediviva, p. 230, 231, 232, 233, 234 b. 235, 238, b. But this was reſtrained and aboliſhed by the two ſtatutes of the 5th of Richard II. Parl. 2. cap. 4. and the 23d of Hen. VI. cap. 14.

Ibid. (E) "There are not above two or three caſes of elections queſtioned or complained of, from the 49th of Henry III. till the 22d of Edward IV. for ought appears by the parliament rolls, and not ſo much as one double return or indenture." Prynne, lib. cit. p. 137. In the caſe of Onſlow againſt Rapley, North Chief Juſtice ſaid, "There were not leſs than ſeventy double returns in 1641." 3 Levinz, p. 30.

Ibid. (F) Prynne (lib. cit.) has given us a very curious petition of the borough of Toriton to the King, praying to be diſcharged from the burthen of ſending members to parliament; and there are many inſtances of ſuch exemptions. "To be a burgeſs to parliament, (ſays he,) or to find or ſend burgeſſes to it, was anciently reputed a matter of great pains and expences, yea a great damage and oppreſſion to the burgeſſes themſelves, and the boroughs that elected and paid them." P. 240.

Ibid. (G) See thoſe inſtances collected in the preface to Glanville's Reports. In the 29th of Hen. VI. there is a petition of a hundred and twenty-four freeholders of Huntingdonſhire to the *King*, complaining of an undue election. Prynne, lib. cit. p. 156, 158. From this, and other circumſtances, Prynne infers, that the right of determining election queſtions was in the King, or the King and the Houſe of Lords. "It is apparent that the King himſelf in that age, and not the Houſe of Commons, or their grand Committee of Privileges (an erection of punier times unknown to our anceſtors) was to redreſs and rectify all falſe and undue returns and elections of knights and burgeſſes *before* and *after* the ſitting of parliament, or elſe the King and Houſe of Lords. As I have elſewhere evidenced by ſundry precedents," lib. cit. p. 259, 260. Plea for the Houſe of Peers, p. 371 to 416. Second Part of

Brief Regiſter and Survey of Parl. Writs, p. 118, 119, 139, 140.

P. 3. (H) " The King in this parliament (4th Edw. III.) " charged the earls, barons, and peers, to give right and true " judgment againſt Simon de Bereford, knight, who had been " aiding and abetting, and adviſing with Roger de Mortimer, " in all the treaſons, felonies, &c, Whereupon they came " before the King, and ſaid with one voice, that the ſaid " Simon was not their peer, and therefore they were not *bound* " to judge him. But," &c. They at that time paſſed judgment of death on ſeveral other actors in the murther of Edw. II. and the earl of Kent; and at the cloſe of all thoſe judgments is another declaration of the peers, " That they ſhould not be drawn " into conſequence, nor be made injurious *to their privileges* in " time to come." Parliam. Hiſt. 2d edit. vol. i. p. 224, p. 226. From Rot. Parl. A. R. R. Edw. III. 4to. Seld. Judic. in Parl. cap. 1.

P. 5, 7. (I) It may be proper in this place to trace the hiſtory of the former method of trying controverted elections in the Houſe of Commons a little at large, as far as it can be collected from the Journals, which only begin in the reign of Edward VI. and are very imperfect till that of Charles I.

It appears that in the firſt year of Queen Mary, 12 Oct. a Committee of ſix perſons was appointed to enquire whether Alexander Newell, burgeſs of Loo in Cornwall, prebendary of Weſtminſter, might be of the Houſe, and likewiſe for John Forſter. Next day (13 Oct.) " It is declared *by the commiſ-* " *ſioners* that A. Newell, being prebendary in Weſtminſter, and " thereby having voice in the convocation-houſe, cannot be a " member of the Houſe, and that the Queen's writ be directed " for another burgeſs in that place." Journ. vol. i. p. 27, col. 2.

In 4 and 5 Philip and Mary, 27 and 28 Jan. two members having been returned each for a county and a borough, and having made their elections (or *perſonally appeared* as it is called in the Journals) for the counties, " It is required (in both caſes) " *by the Houſe* that another perſon be returned for the borough." Journ. vol. i. p. 47. col. 2.

It would ſeem by Sir Simon D'Ewes's Journal, p. 438. that there was a ſtanding Committee of privileges and elections in Queen Elizabeth's time, 1588.

At the beginning of the firſt parliament of James I. immediately after the affair of Sir Francis Goodwin had been moved, a Committee of privileges and returns (as it was then called) was

was moved for, and appointed, conſiſting of twenty-five members; and in the entry of this motion it is ſaid, "This is an "uſual motion in the beginning of every parliament, and the "authority committed to this Committee was to examine all "matters touching privileges and returns, and to acquaint the "Houſe with their proceedings, from time to time, ſo as order "might be taken according to the occaſion, and agreeable "with ancient cuſtom and precedent." 22 March 1603-4. Journ. vol. i. p. 149. col. 2. 150. col. 1.

The practice of appointing ſuch a Committee at the beginning of every ſeſſion of parliament continued ever after, till 10 Geo. III. with only one interruption which ſhall be taken notice of immediately.

23 Feb. 1623-4. The Committee for Privileges (as it is then entitled) being appointed, "It was moved, that all who "come ſhould have voices. Mr. Speaker putteth in mind of "the order of Houſe which never ſo in this.——Reſolved No. "Queſtion whether the perſons nominated only to be—Reſolved "Yea." Journ. vol. i. p. 671. col. 2.

In 1625-6. 2 March, a Committee is appointed of twenty, "and all that will come to have voice." Journ. vol. i. p. 829. But this order was not renewed in ſucceeding ſeſſions till 1673.

The number of the members appointed on this ſtanding Committee encreaſed greatly. In 1628-9, they amounted to eighty-five. In 1660 (from which time the title was a Committee of privileges and elections) they were between two and three hundred. So in 1661. 11 May. Journ. vol. viii. p. 247. col. 1. &c.

In 1673. 30 Oct. It is ordered, that all who come ſhall have voices in the Committee. Journ. vol. ix. p. 284. col. 2. This order was always repeated afterwards when the Committee was named.

In the mean time, election cauſes were ſometimes tried at the Bar of the Houſe, on motion being made for that purpoſe. Vide Jour. vol. ix. p. 716. col. 1. 23 May 1685, *& paſſim.*

In 1707-8. 27 Jan. a Committee was appointed to conſider of methods for the more eaſy and ſpeedy trying and determining of controverted elections, of which all the gentlemen of the long robe were members. (Vol. xv. p. 516. col. 2.) and they reported, 18 Feb. three reſolutions: the two firſt of which were, 1. "That all matters that ſhall come in queſtion touching re-"turns or elections ſhall be heard at the Bar of the Houſe. "2. That all queſtions, at the trial of elections ſhall, if any "member inſiſt upon it, be determined by ballot." The third reſolution

reſolution will be mentioned in another note (N). The three were agreed to by the Houſe. The ſecond and third made ſtanding orders. (Journ. vol. xv. p. 551. col. 1. and 2.)

21 Feb. Several ſtanding orders were made for regulating the manner of ballotting. Journ. vol. xv. p. 559. col. 2.

Accordingly, in the ſame ſeſſion, the merits of the election for Aſhburton in Devonſhire were heard at the bar, and, the right of election coming in queſtion, the ballot was demanded, and the queſtion determined in that manner, 26 Feb. Journ. vol. xv. p. 577. col. 1, 2.

But it appears, that this was the only caſe ſo determined, and at the beginning of the very next ſeſſion, which was the firſt of a new parliament, a motion being made, and the queſtion put in the words of the ſecond reſolution of 18 Feb. the Houſe divided, and it paſſed in the negative 178 to 169. 22 Nov. 1708. Jour. vol. xvi, p. 7. col. 1,

Afterwards, in 1710, at the beginning of the next parliament, an unſucceſsful attempt was made to renew the trial by ballot. 9 Dec. "A motion being made, and the queſtion being put, "that all queſtions upon elections and returns of members to "ſerve in parliament, be determined by ballot, if demanded by "any member." The Houſe divided, and it paſſed in the negative, 247 to 39. Journ, vol. xvi, p. 429. col. 1.

The firſt reſolution of 18 Feb. 1707-8, was, however, renewed, 22 Nov. 1708; and inſtead of the uſual Committee of privileges and elections, a Committee of privileges was choſen, vol. xvi. p. 6. col. 2. p. 7. col. 1. and all election cauſes, during that ſeſſion, were tried at the Bar of the Houſe. But, at the beginning of the next, a Committee of privileges and elections was appointed in the uſual form, and ſo continued to be, till the firſt ſeſſion after the act of 10 Geo. III. ſince which time only a Committee of privileges has been appointed. In that interval, petitions were, as formerly, ſometimes referred to the Committee, and ſometimes heard at the Bar. In the two ſeſſions before the act took place they were almoſt all heard at the Bar. Journ. vol. xxxii. p. 22. & *infra* p. 460. & *infra*.

P. 5. (K) The claim of the chancellor ſeems to have been this. "That, either on the ſuggeſtion of the ſickneſs of "the member for any place, or when a vacancy happened dur-"ing the receſs of parliament, he was entitled, and the pro-"per perſon, to iſſue a new writ; and that the perſon return-"ed upon ſuch new writ ought to be received." In the famous caſe of Sir Francis Goodwin, the Chancellor had thought himſelf entitled to iſſue a new writ on the return of a perſon ſuppoſed to be ineligible, being an outlaw. 1603-4, 22 March.

Journ,

Journ. vol. i. p. 149. There is hardly any inſtance of the Chancellor's pretending to decide between two competitors. Indeed in thoſe times, queſtions of elections were generally brought on, not by the contention of individuals who had been rival candidates, but from the jealouſy of the Houſe concerning its privileges.

The Houſe reſolved, 18 March, 1580-1, "That during the "*ſitting* of this court, there do not, at any time, any writ go "out for the chooſing or returning of any knight, citizen, bur- "geſs, or baron, without the warrant of this Houſe firſt di- "rected for the ſame to the clerk of the crown, according to "the ancient juriſdiction and authority of this Houſe, in that "behalf accuſtomed and uſed." D'Ewes. p. 307, 308.

This reſolution ſeemed to diſtinguiſh, as to the right of iſſuing writs, between the *actual* ſitting, and the receſs of parliament. Accordingly, in the caſe of Goodwin, juſt cited, the Chancellor ſtill claimed that right on vacancies, or on the election of diſqualified perſons, during the receſs. That the idea of ſuch a diſtinction generally prevailed after the Reſtoration is evident from the words of Prynne, quoted in note (G). In 1672, Lord Shafteſbury, then Chancellor, iſſued writs to fill up the vacancies which had happened during the receſs. But the new Speaker was ſcarce in the chair, "(6 Feb. 1672-3) "before a member ſtanding up, and looking about him, ſaid, he "obſerved ſeveral new faces in the Houſe, and did not remem- "ber that, before their laſt riſing, the Houſe had been moved "for filling ſo many places, ſo he doubted the regularity of "the ſitting of thoſe people, and moved that their titles might "be examined. Another member ſeconding, ſaid he ſuppoſed "thoſe gentlemen would have the modeſty to withdraw while "their caſe was under debate, and not wait for the order of "the Houſe. So the whole ſet of new-elects, though moſtly "loyaliſts, filed out, and came in no more on that choice." North's Examen, p. 56. On the 4th of Feb. before the choice of the Speaker was approved of, (Journ. vol. ix. p. 245. col. 1.) a motion and complaint had been made on this ſubject, "Which "occaſioned the King (5. Feb.) after the Lord Chancellor's "ſpeech, to declare to the Commons, that he had given or- "der to the Lord Chancellor to ſend out writs for the better "ſupply of their Houſe, having ſeen precedents for it; but if "any ſcruple or queſtion did ariſe about it, he left it to the "Houſe to debate as ſoon as they could." Chandler's Deb. vol. i. p. 169. 6. Feb. The Houſe reſolved, "that warrants "do iſſue under Mr. Speaker's hand to the clerk of the crown, "for the ſuſpending of all the writs iſſued for elections of per-

"ſons

" ſons ſince the laſt ſeſſion that were not executed *before the* " *firſt day of the ſitting of the Houſe this ſeſſion*, and for the " making new writs in the room of thoſe ſuſpended." Thus far the old idea of the diſtinction between the actual ſitting and the receſs ſeems to have been followed. But the matter being further debated, and a motion being made (by the court party) " for a Committee to inſpect the precedents touching " elections and returns, and to report the matter to the Houſe " on Saturday morning next, on a diviſion, it paſſed in the ne- " gative, 169 to 103." The Houſe then went into the debate of the matter of iſſuing writs, and making elections and returns of perſons without order or warrant from this Houſe, and ſeveral caſes being cited, and the matter at large debated, and the general ſenſe and opinion of the Houſe being, that, during the *continuance* of the high court of parliament, the right and power of iſſuing writs for electing members to ſerve in this Houſe in ſuch places as are vacant, is in this Houſe, who are the proper judges alſo of elections and returns of their members; thereupon it was reſolved, " That elections upon the writs iſſued *ſince* " *the laſt ſeſſion* are *void*, and that Mr. Speaker do iſſue out " warrants to the clerk of the crown to make out new writs " for thoſe places." Journ. vol. ix. p. 248. col. 1. In the courſe of this debate (which was very warm and angry) Mr. Poole referred to the reſolution of 18 March, 1580, and explained it to mean from the *firſt day of ſitting*, whether *actually ſitting or not*. Grey's Debates, vol. ii. p. 6. This is the conſtruction virtually put upon it by the reſolution of 6. Feb. 1672-3. None of the precedents cited in Grey, in favour of the Chancellor's right, are clearly in point; and it was juſtly obſerved in the courſe of the debate that, if the Chancellor were to have ſuch power, he would make himſelf judge of returns. Grey's Deb. vol. ii. p. 5.

One reaſon probably for ſuppoſing a power lodged ſomewhere for ſupplying vacancies during a receſs, was the inconvenience of a ſeat remaining vacant the whole time of a long adjournment or prorogation, by which the diſorder attending oppoſition among candidates was ſo much increaſed and protracted. This inconvenience has been, in a great meaſure, removed by the acts of 16 Geo. III. cap. 41. and 15 Geo. III. cap. 36. If a vacancy happen during a receſs for more than twenty days, whether by prorogation or adjournment, in conſequence of the death of a member, or his becoming a Peer of Great Britain, *the Speaker of the Houſe of Commons* is, by thoſe acts, authorized and required, upon receiving a written certificate of the vacancy, under the hands of two members of the Houſe, to cauſe notice

notice thereof to be inſerted in the London Gazette, and a fortnight thereafter, to iſſue his warrant for a new writ.

P. 8. (L) In a former note (I) we have ſeen that the attempt to eſtabliſh a trial by ballot proved abortive. By 7 & 8 Will. III. cap. 7 § 1. it is enacted, "That, in caſe any perſons ſhall return any member to ſerve in Parliament, for any county, city, borough, cinque-port, or place, contrary to the laſt determination in the Houſe of Commons of the right of election in ſuch county, city, &c. ſuch return ſo made ſhall be adjudged to be a falſe return."

This made the laſt determination of the Houſe binding on returning officers. The Houſe itſelf was ſtill left open to the ſame arbitrary deciſions as ever. But the ſtatute of 2 Geo. II. cap. 24. § 4. enacts, "That ſuch votes ſhall be deemed to be legal which have been ſo declared by the laſt determination in the Houſe of Commons, which laſt determination concerning any county, ſhire, city, borough, cinque-port, or place, ſhall be *final to all intents and purpoſes whatſoever*, any uſage to the contrary notwithſtanding."

P. 9. (M) Another ſtatute paſſed in the following year, explaining and ſupplying ſome omiſſions in the firſt. 11 Geo. III. cap. 42. The ſtatute of the 14th Geo. III. makes them both perpetual.

P. 22. (N) The firſt order which appears in the Journals for limiting the time for queſtioning elections to a fortnight, was made in the firſt Parliament of Car. I. 18 Feb. 1625-6. Journ. vol. i. p. 821. col. 2. From the beginning of the Long Parliament in 1640, it was continued every new ſeſſion, till 1707, when the third reſolution of the Committee mentioned in Note (I) was made a ſtanding order, viz. "That all petitions upon every new Parliament, relating to elections and returns be delivered to the clerk of the Houſe, and be laid by him upon the table, before the Speaker be choſen."

Though this was a ſtanding order, it was renewed in the form of a reſolution, together with the firſt (concerning the trials at the Bar of the Houſe) at the beginning of the next Parliament, 22 Nov. 1708. Vol. xvi. p. 6. col. 2 p. 7. col. 1. The limitation of the fortnight was continued as to elections on vacancies during the continuance of a parliament. The third reſolution of 18 Feb. 1707-8 was not afterwards renewed, but it continued a ſtanding order, and was adhered to till 1722, when a Committee was appointed 31 Oct. (Journ. vol. xx. p. 50. col. 1.) to conſider of that order, and in conſequence of their report, 21 Nov. it was diſcharged from being one of the ſtanding orders of the Houſe. *Ibid.* p. 61. col. 1. Since that time the

the limitation after a general election has always been a fortnight, as well as after elections on an intermediate vacancy.

P. 22. (O) This construction is established by three precedents.

24 March, 1661-2. "Upon report made by Serjeant "Charlton from the Committee of privileges and elections, "that a petition was delivered into the said Committee on "behalf of Sir William Dudley on Saturday last, touching the "election for the town of Northampton, but, by reason of the "adjournment of that Committee, the petition was not deli-"vered in by the precise time limited by the rule of this House. "Resolved, upon the question, that the said petition be ad-"mitted to be received; as if the same had been delivered in "due time." Journ. vol. viii. p. 394. col. 2. It is to be observed on this entry, that at that time petitions complaining of undue elections were presented directly to the Committee. The practice of presenting them to the House was introduced afterwards in the same reign.

11 Jan. 1747-8. On occasion of two petitions, one of Fraser Honeywood, Esq; and the other of certain inhabitants of Shaftesbury, complaining of an undue election for that place, it appeared, that the return had been delivered into the office of the clerk of the crown, on the 14th of Dec. preceding, and the House had adjourned from 19. Dec. to 11. Jan. The entry of the 24th of March, 1661-2, being read, "Ordered, That "the said petitions now offered to be presented to the House, "be admitted to be received, the same not being presented in "due time, because of the last adjournment of the House." Vol. xxv. p. 474. col. 2.

19 Jan. 1762. In the famous case of Durham (which gave rise to the statute of 3 George III. cap. 15. against occasional freemen) the return had been delivered 26 Dec. 1761. The House had adjourned from 23 Dec. to 19 Jan. 1762. The petitions were offered to be presented that day, and the entry of 17 Jan. 1747-8 being read, a similar order was made in that case. Vol. xxix. p. 105, col. 1. The Journals, in both the two last cases, recite, that the House had been informed that the petitioners would have petitioned the House within the fortnight, if the House had not been adjourned.

When the House is not adjourned, they are very strict with regard to the limitation. Last winter, a petition complaining of an undue election and return for the district of Elgin Banff Cullen Kintore and Inverury was delivered to the clerk of the House, on the evening of the day on which the fortnight expired; but, after the House was up: and though there were very

very particular circumſtances in the caſe, which ſeemed to call for a diſpenſation with the rule, it was determined that the petition ſhould not be received. Votes, 20 Dec. 1774, p. 104, 105. 23 Dec. p. 112.

P. 23. (P) This reſolution was firſt made 16 Jan. 1735-6, on the ſame day with the ſtanding order for reſtraining counſel from offering evidence againſt the laſt determination of the Houſe on the right of election, (*vide* Caſe of Milborne Port,) ſince which time it has been continued every ſeſſion.

P. 24. (Q) That order appears firſt 26 April, 1660. Journ. vol. viii. p. 2. col. 1.

P. 27. (R) 25 Nov. 1695. It is ordered, "That it be an "inſtruction to the Committee of privileges and elections, that "they do admit but two counſel of a ſide in any cauſe to be "heard before them." Journ. vol. ii. p. 336. col. i. The ſame order was renewed at the beginning of every ſeſſion, till 3. Jan. 1701-2, when it was made a ſtanding order, and ſtill continues to be ſo. Journ. vol. xiii. p. 648. col. 1.

P. 28. (S) As this ſeparation of intereſts may ſometimes be a mere ſtratagem, in order to gain an opportunity of ſtriking off two for one from the 49, the Houſe muſt be ſatisfied that there is a real difference in the caſes, before they will allow of it. On this account it was refuſed in the Caſe of Shafteſbury, and the Houſe divided upon it in that of St. Ives. Indeed the two ſitting members may wave the privilege of ſtriking off ſeparately, as was done by Mr. Drummond in the laſt mentioned caſe. Perhaps, the beſt rule for the Houſe to follow, in caſes where the ſitting members deſire to ſeparate their intereſts, and to appear by ſeparate counſel, would be to truſt to the candour of the counſel themſelves; for it is eaſy to ſee, that there can hardly be a caſe where it may not, in the event, for any thing the Houſe can know, become neceſſary for the two ſitting members to diſtinguiſh their caſes in the courſe of the cauſe, and even become adverſe to each other. Thus, where there is a charge of bribery, although the two ſitting members perhaps canvaſſed together, and, in public, acted in concert, yet one of them may have been guilty of bribery, without the concurrence or privity of the other, who, therefore, will have a diſtinct intereſt, and, on that account, will be entitled to a ſeparate defence, and ſeparate counſel. In like manner, when the queſtion turns upon the majority of legal votes, if there is but one petitioner, and he ſhould clearly make out a majority over both the ſitting members, or if there be two petitioners, and one of them prove that he had a majority over all the other candidates, and the other petitioner appear to have had fewer legal

legal votes than either of the other three, in both theſe caſes, the remaining ſeat muſt be conteſted between the two ſitting members, and their intereſts muſt become oppoſite and hoſtile. It was on this laſt ground, that the ſitting members, in the caſe of Dorcheſter, were, on the ſuggeſtion of the counſel, admitted to appear as diſtinct parties. Indeed, there is an advantage in permitting the ſitting members to diſcriminate their caſes, which will, perhaps, in time, lead the Houſe to be very indulgent in that reſpect; for, by that means, the nominees will not be appointed by the parties, which many think a defect in the conſtitution of theſe Committees, on account of the ſuppoſed partiality, and the almoſt unavoidable bias, which men of the greateſt integrity are liable to, in favour of the party by whom they are nominated.

The diſadvantage of allowing a ſeparation of caſes and diſtinct counſel are, firſt, as was ſtated already, that this may be but an artful pretext to procure the means of a double negative in ſtriking the Committee; and ſecondly, becauſe by this means the cauſe is protracted, and the expence inhanced. Of the expence, however, the parties are to judge; beſides, the Houſe might, if they choſe, limit each party to one counſel, and might alſo obviate the firſt objection by making it a previous condition, that the parties ſhould wave their right of ſtriking off two for one.

P. 30. (T) The directions of the ſtatute concerning the clearing of the court are only permiſſive, not obligatory. § 27. And, in the Committee for Pontefract, one of the members propoſed, that they ſhould deliver their ſentiments in open court, according to the practice in the ordinary courts of juſtice. However this was not agreed to, and the cuſtom of clearing the court has hitherto been uniformly followed.

P. 31. (U) It was the general practice in the old Committee of elections, and at the Bar of the Houſe, when the right of election was in diſpute, to ſeparate that queſtion from the reſt of the cauſe, and determine upon it firſt. See the Journals, *paſſim*.

P. 31. (V) Ever ſince the 3d of Jan. 1701-2, the following reſolution has been renewed at the beginning of every ſeſſion. Journ. vol. xiii. p. 648. col. 1.

Reſolved, "That if it appear, that any perſon hath given "falſe evidence, in any caſe, before this Houſe, or any Com- "mittee thereof, this Houſe will proceed with the utmoſt ſe- "verity againſt ſuch offender."

This reſolution ſcarcely extends to prevarication, or miſbehaviour; but in ſeveral caſes the Houſe has puniſhed perſons guilty

guilty of thoſe offences before a Committee, with impriſonment, upon the report of the chairman of the Committee. "On the 11 of May, 1772, Mr. Bacon reports from the ſelect "Committee to whom the petition of George Preſcot, Eſq. "complaining of an undue election and return for the borough "of Milborne-Port, in the county of Somerſet, is referred, "that he was directed by the Committee to acquaint the "Houſe that Mary Hoſſe, being called as a witneſs before the "ſaid Committee, has greatly prevaricated and otherwiſe miſ-"behaved, in giving her evidence.—The Houſe was moved, "that an act made in the tenth year of his preſent majeſty's "reign, intituled, "An act to regulate the trial of contro-"verted elections, or returns of members to ſerve in parlia-"ment," might be read. And the ſame was read according-"ly.—The Houſe was alſo moved, that the entries in the "Journal of the Houſe of the 14th day of April 1746, of the "proceedings of the Houſe in relation to Edmund Jones, "might be read.—And the ſame was read accordingly.—— "The Houſe was alſo moved, that the entries in the Journal "of the Houſe of the 19th day of May, 1733, of the proceed-"ings of the Houſe in relation to Caleb Leigh, might be read ——And the ſame being read accordingly——Ordered, *nemine* "*contradicente*, That the ſaid Mary Hoſſe, having groſsly "prevaricated, and otherwiſe miſbehaved, in giving her evi-"dence before the ſelect Committee appointed to hear and "determine the matter of the petition of Geo. Preſcott, Eſq. "complaining of an undue election and return for the bo-"rough of Milborne Port in the county of Somerſet, be, for "her ſaid offence, taken into the cuſtody of the ſerjeant at "arms, attending this Houſe." Journ. vol. xxxiii. p. 746. col. 2.

This caſe of Milborne Port, was the third that was tried by the new judicature.

In the two caſes of 1746, (Journ. vol. xxvi. p. 124. col. 2.) and of 1733. (Journ. vol. xxii. p. 157. col. 2.) the reports of the chairman of the committees (which were not Committees of elections) as well as the order of the Houſe upon them were in the ſame terms as in the caſe of 1772.

In all three, the order was made immediately in conſequence of the report of the Committee, without hearing the party.

P. 32. (W) The preſent mode of altering or amending returns, is this. The clerk of the crown is ordered to attend with the return, and, in the Houſe, amends it, by eraſing the name of the perſon, or perſons, whom the Houſe have determined not to have been duly elected, and inſerting that of thoſe who

who ought to have been returned, in their place. If there be two returns, and one of them is determined to be void, he takes that off the file, leaving the other; and, if that other contain the names of the perſon or perſons determined not to have been duly elected, it is amended in the manner juſt deſcribed. It is poſſible for the ſame return to undergo two amendments, when there are two queſtions, one upon the legality of the return, and the other on the merits of the election, and they are ſeparately determined at different times. Thus in the caſe of Morpeth, though the return has been altered by eraſing the name of Mr. Eyre, and inſerting that of Mr. Byron, if, when the merits of the election come to be tried, it ſhould appear to the Committee, that Mr. Eyre had the Majority of legal votes, and was duly elected, his name will come to be inſerted again in the place of Mr. Byron's.

The practice was not always as it is now. In very ancient times the method ſeems to have been to ſend a new writ to the ſheriff, to enquire who had been elected, and if others than thoſe who had been returned ſhould appear to have had the majority of voices, to make a return of them into *Chancery*. See the caſe of Lancaſhire, an. 1362, in Prynne's Brev. Parl. Part I. p. 259. In 1592, the Speaker ſaid, "No return can be amend-"ed in this Houſe; for the writ, and the return are in Chan-"cery, and muſt be amended there." This doctrine was founded on the ſame principle with the claim of the Chancellor to determine the legality of returns, and met with the ſame fate. In the caſe of Chippenham, an. 1624 (which is reported in Glanville, though the circumſtance here taken notice of is not mentioned) there was a double return, one of Mr. *Charles* Maynard, and Mr. Pym, the other of Mr. *Charles* Maynard, and Sir Francis Popham. The Houſe divided in favour of the latter return. There was no queſtion about the validity of Maynard's election; but his name was miſtaken in the proper return, his real name being *John* Maynard. This was to be amended, and it was reſolved, "That the bailiff ſhould do it, and not "the clerk of the crown, and that the return ſhould be ſent "down to the bailiff in the country for that purpoſe." Journ. vol. 1. p. 686. col. 2. In like manner, in the caſe of Leiceſterſhire, 12 Feb. 1620-1, the ſheriff, not the clerk of the crown, was ordered to alter the return. *Vide infra*, Caſe of New Radnor, (Note D).

The courſe came ſoon to be, for the returning officer to be ordered to attend the Houſe, together with the clerk of the crown, when the return was to be amended, and the returning officer to make the amendment. If the returning officer neglected

lected to attend, it was done by the clerk of the crown. Case of Abingdon, 23 May, 1660. Journ. vol. viii. p. 42, col. 1, 2. If there were two returns for the same place annexed to the writ, and one of them was determined to be good, the clerk of the crown, only, attended in such case, to take the void return off the file.

Returns continued to be amended by the returning officers, till near the end of the last century. There seems to have been two reasons for this: one, jealonsy of the court of Chancery, and its officers; the other, that, as there was often some blame lay on the returning officer when the persons not duly elected were returned, he was deemed the proper person to be the instrument of amending his own error; there was a degree of humiliation and punishment in doing this publicly in the House, and, by this means, he was in the way, if it should be thought proper to impose any more severe punishment upon him. See the case of Chichester, 21 May, 1660, vol. viii. p. 40, col. 2.

Towards the beginning of King William's reign, the present method of having the return in all cases amended by the clerk of the crown, was adopted. The claims of the Chancellor were then at an end, and if it was necessary to censure or punish a returning officer, the House ordered his attendance for that special purpose.


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CASE

Of the BOROUGH of

MILBORNE PORT,

In the County of SOMERSET.

The Committee for trying this cauſe was choſen on Friday, the 20th of January, 1775, and conſiſted of the following Gentlemen.

Frederick Montagu, Eſq.	Chairman,	Higham Ferrers
Sir George Saville, Bart.		Yorkſhire
Hon. Thomas Walpole,		King's Lynn
John Orde, Eſq.		Midhurſt
Lord John Cavendiſh,		York
Joſeph Martin, Eſq.		Tewkeſbury
Paule Fielde, Eſq.		Hertford
Mr. Alderman Hayley,		London
William Henry Lyttelton, Eſq.		Bewdley
Sir Watkin Williams Wynne, Bart.		Denbighſhire
James Grenville, jun. Eſq.		Buckingham
Richard Grenville, Eſq.		Buckingham
Thomas Whitmore, Eſq.		Bridgenorth
NOMINEES.		
Of Walter and Browne.		
Beaumont Hotham, Eſq.		Wigan
Of Lutterell and Wolſeley.		
Robert Gregory, Eſq.		Rocheſter

Members for

PETITIONERS.

Edward Walter, Eſq. and Iſaac Hawkins Browne, Eſq.
The Hon. Temple Luttrel, and Charles Wolſeley, Eſq.
Certain Inhabitants of the Town and Borough of Milborne Port, (in the intereſt of Luttrel and Wolſeley.)

COUNSEL.

For Walter and Browne.

Mr. Lee, Mr. Hobhouſe.

For Luttrel and Wolſeley.

Mr. Mansfield, Mr. Hotchkin.

THE CASE

Of the BOROUGH of MILBORNE PORT.

ON Saturday, the 21ſt of January, the Committee met, and the three petitions being firſt read, it appeared that there were, in this caſe, three returns, made by different perſons claiming to be returning officers, all of which had been annexed to the writ by the ſheriff, and returned into the office of the clerk of the crown. By one, Walter and Browne; by the other two, Luttrel and Wolſeley were returned.

The petitions likewiſe contained a claim by each party of the majority of legal votes; and mutual allegations of bribery. In the petition of Walter and Browne, it was alſo alledged, that Luttrel, at the time of his election and return, had, "by himſelf, or ſome perſon in truſt for him, an office, "place, or employment, touching, or concerning the fram-"ing, collecting, or managing his Majeſty's cuſtoms," whereby he was incapable of being elected (1).

The laſt determination of the Houſe, on the right of election, was then read, which is as follows.

8 Dec. 1702. Reſolved, "That the right of election of "burgeſſes, to ſerve in Parliament for the borough of Mil-"borne Port, in the county of Somerſet, is only in the "capital bailiffs, and their deputies, in the commonalty "ſtewards, and inhabitants thereof paying ſcot and lot (2)."

Then,

(1) Votes, 6 Dec. 1774, p. 13, 14, 15, 16, 17.
(2) Journ. vol. xiv. p. 75.

Then, as there were different perſons claiming to be returning officers, the following reſolution of the Houſe was read.

2 Dec. 1747, Reſolved, "That the execution of the "precept for electing burgeſſes for the borough of Milborne "Port in the county of Somerſet, and the making the re- "turn thereof, are only in the two ſub-bailiffs of the ſaid "borough, or in one ſub-bailiff if there are not two (3)."

After this the ſtanding order of 16 Jan. 1735-6 was read, viz.

Ordered, "That the counſel at the bar of this Houſe, or "before the Committee of privileges and elections, be re- "ſtrained from offering any evidence touching the legality "of votes, for members to ſerve in Parliament for any coun- "ty, ſhire, borough, cinque-port or place, contrary to the "laſt determination in the Houſe of Commons, which de- "termination by an act paſſed in the ſecond year of his "Majeſty's reign, intituled "An act for the more effectual "preventing bribery and corruption in the election of mem- "bers to ſerve in Parliament," is made final to all intents "and purpoſes whatſoever, any uſage to the contrary not- "withſtanding (4)."

It being agreed to proceed firſt upon the legality of the different returns, ſeparately from the other queſtions, and the return of Walter and Browne being *immediately* annexed to the precept, their counſel began, in conſequence of the following ſtanding order.

18 March, 1727-8, Ordered, "That, in all caſes on "double returns, where the ſame ſhall be controverted, "either at the bar of this Houſe, or in Committees of pri- "vileges and elections, the counſel for ſuch perſon who "ſhall be firſt named in ſuch double return, or whoſe return "ſhall be *immediately* annexed to the writ or precept, ſhall "proceed in the firſt place (5)."

The conſtitution of the borough of Milborne Port is this. It conſiſts of nine bailiwicks, of which part are the property of Thomas Hutchins Medlycot, Eſq. and part of Mr.

(3) Journ. vol. xxv. p. 458, col. 1.
(4) Journ. vol. xxii. p. 498, col. 2.
(5) Journ. vol. xxi. p. 89, col. 1.

Walter. Of the nine capital bailiffs for thoſe bailiwicks, there are two who are called the *reigning* bailiffs for the year, and they preſide in the borough and are the head-officers for that year; thoſe of the different bailiwicks being *reigning* bailiffs in their turns, according to a certain known rotation. Each of the reigning bailiffs appoints a ſub-bailiff for the year, and the two ſub-bailiffs, according to the reſolution of 1747 (5), are the returning officers for that year.

Mr. Medlycot's property and that of Mr. Walter are ſo intermixed, that, in following the eſtabliſhed rotation, in ſome years one of the reigning bailiffs is in the appointment of Medlycot, and the other in the appointment of Walter; in ſome years they are both appointed by Medlycot, and in others, both by Walter.

In 1773, one of them was appointed by Medlycot, and he nominated one Elias Oliver to be his ſub-bailiff; and the other by Walter, who nominated one Robert Baunton to be his ſub-bailiff. In 1774, it was Mr. Medlycot's turn to appoint both the reigning bailiffs.

☞ A witneſs (one John Ames) ſwore, that in October 1775, Medlycot ſaid to him, that as both the returning officers would be his own the next year, if the gentlemen *he ſhould* nominate at the poll ſhould have but a dozen good votes, they ſhould be returned. To affect the credibility of this witneſs, his own brother was produced, who ſwore that he had told him, that Mr. Walter ſaid, he would get him a place, and make a man of him. John Ames, on his croſs examination, had previouſly denied that ever Walter made him any promiſe to that effect.

The ſub-bailiffs have always been appointed at a court-leet after Michaelmas-day, holden by a ſteward named by the former ſub-bailiffs. Since the intereſts have been divided, there have been two ſtewards who have holden ſeparate courts, but always on the ſame day.

There is a fair at Sherborne, in Dorſetſhire, called Pack-Monday fair, being kept on the firſt Monday after Michaelmas day, which is called Pack-Monday.

It appeared, by the witneſs, that the court-leet for appointing ſub-bailiffs, had always been holden, before and ſince

(5) *Supra*, p. 51.

ſince the ſtyle was altered, on the firſt Tueſday after Pack-Monday fair, and that there were entries to this purpoſe in the minute-book of the ſteward of the court.

The witneſſes ſwore (one of them, William Burgler, being 62 years of age) that they had always underſtood that the court was regulated by the fair, and the court-day was was called Pack-Tueſday. But in none of the court-books or rolls, was there any entry referring the holding of the court to the Tueſday after Sherborne fair. It only appeared to have been always holden on the firſt Tueſday of October, before the change of ſtyle took place.

On the third of October 1774, the precept for the election was delivered to Robert Baunton, who gave his receipt for it; and, having communicated with the other ſub-bailiff (Oliver), they concurred in appointing the day of election to be on the tenth.

On examining the precept, it appeared that, in the direction to the "*ſub-bailiffs*," the (*s*) had been effaced, to make it "*ſub-bailiff*;" but there was no evidence that any fraud was intended by this.

On the 4th (being the firſt Tueſday in October, N. S.) Oliver, together with Medlycot and others, broke open the Town-hall, the perſon who had the key not being found, and Mr. Medlycot having nominated his brother, the Rev. George Hutchins, and Robert Curtis, to be the reigning capital bailiffs for the year enſuing, they came into the court-leet (which was opened according to form) and appointed John Newton, jun. and John Peckham, to be their ſub-bailiffs.

The reigning bailiffs, and the ſub-bailiffs enter on their offices immediately after their appointment.

At the ſame court, Oliver was appointed a conſtable, by the jury, and ſworn into that office.

On the tenth, the election came on, and there were three polls taken. One by Baunton, who declared the majority of legal votes to be in favour of Walter and Browne; and accordingly annexed a return of them to the precept; one by Oliver; and a third by Newton and Peckham. By each of the two laſt, Luttrél and Wolſeley had the majority of votes, and accordingly there were two returns made of them. Counter-parts of all the three were executed by the under-ſheriff, and they were all annexed to the writ.

If Newton and Peckham were the legal ſub-bailiffs at the time of the election, their return only was valid.—If they were not, it was void; and, in ſuch caſe, the queſtion would be, whether the return of Baunton, or of Oliver, was the legal return, or whether they were both void.

If the court-leet, holden on the fourth of October, was the legal court for the appointment of the annual ſub-bailiffs, Newton and Peckham were the legal ſub-bailiffs, and returning officers on the tenth.

The queſtion concerning the legality of the court-leet turned chiefly upon the ſtatute for altering the ſtyle (6).

By the firſt ſection of that ſtatute, it is enacted, "That "the fixed terms of Hilary and Michaelmas in England, "the courts of great ſeſſions in the counties palatine, and in "Wales, the courts of general quarter ſeſſions and general "ſeſſions of the peace, *and all other courts of what nature or "kind ſoever*, whether civil, criminal, or eccleſiaſtical, and "all meetings and aſſemblies of any bodies politick or cor-"porate, either for the election of any officers or members "thereof, or for any ſuch officers entering upon the execu-"tion of their reſpective offices, or for any other purpoſe "whatſoever, which by any law, ſtatute, charter, *cuſtom* or "*uſage*, within this kingdom, or any other dominion of the "crown of Great Britain, are to be holden and kept on any "fixed or certain day of any month, or on any day depend-"ing on the beginning, or any certain day or any month *(ex-"cept ſuch courts as are uſually holden or kept with any fairs or "marts)* ſhall from time to time be holden and kept upon, "or according to the ſame reſpective *nominal* days and "times whereon, or according to which, the ſame were to "be holden before this act, but which ſhall be computed "according to the ſaid new method of numbering and "reckoning the days of the kalendar, that is to ſay, *eleven "days ſooner than the reſpective days whereon the ſame were "then holden or kept*."

By the fourth ſection of the ſame ſtatute it is enacted,

"That the holding and keeping *of all markets, fairs and "marts*, which are neither fixed to certain *nominal* days of "the month, or depending on the beginning, or any cer-"tain

(6) 24 Geo. II. cap. 23, anno 1751.

" tain day of any month, *and all courts incident to, or be-*
" *longing to, or uſually holden or kept with, any ſuch fairs or*
" *marts*, fixed to ſuch certain times as aforeſaid, ſhall not
" be continued upon the ſame *nominal* days of the month,
" or according to ſuch *nominal* days, but upon, or accord-
" ing to the ſame *natural* days, upon or according to which
" they ſhould have been holden in caſe this act had not
" been made, that is to ſay, eleven days later than the ſame
" would have happened according to the *nominal* days of the
" new ſupputation of time."

The counſel for Walter and Brown contended,

That the court in queſtion, was *a court uſually holden with a fair*, and therefore within the exception of ſection 1. and the proviſion of ſection 4. and to be holden on the ſame *natural* day as formerly; i. e. according to the old ſtyle. That this was evident from the conſtant practice ſince the change of the ſtyle, and the general ſenſe of the place, and from the ſteward's book.

That if it were not ſo, yet the holding it laſt year according to the new ſtyle, for the firſt time, immediately on the eve of the election, contrary to the uſage ever ſince the ſtatute of the 24 of Geo. II. without any notice being given of ſuch an intended innovation, till the precept for the election came to the borough, coupled with the declaration of Medlycot, which had been proved by one of the witneſſes (7), ſhewed that the intention of holding it then was occaſional, and evidently only taken up on account of the diſſolution of the parliament, which brought on the election before Mr. Medlycot's two ſub-bailiffs could have come into office, if he had waited till the uſual time; conſequently, that, on this ground, the appointment of Newton and Peckham was fraudulent and void.

That, if they were legally appointed, ſtill the former ſub-bailiffs, being the returning officers at the time when the precept was delivered, and one of them having received, and given his receipt for it, they were the only perſons competent to make the return, according to the 7th and 8th of Will. III. cap. 25. § 1. (A) But—

That, if the queſtion came to be between the returns made by Baunton and Oliver, it was clear that Oliver, by accepting

(7) *Supra*, p. 52.

accepting the office of a conſtable, at the court-leet holden on the 4th of October, had abdicated his former office, and could not afterwards pretend to exerciſe it. That the principles of a much more remarkable inſtance of abdication were in every reſpect applicable to this caſe. That Baunton, therefore, was the only ſub-bailiff in the borough at the time of the election, and the power of making the return ſolely in him, according to the reſolution of the Houſe of 1747 (8), in the ſame manner as if Oliver had been dead, or had left the place.

The counſel for Luttrel and Wolſeley argued,

That though it did appear that the Michaelmas court-leet had uſually been holden on Tueſday after Sherborne or Pack-Monday fair, yet *that* was merely *accidental*, becauſe it happens that the firſt Tueſday in October muſt of neceſſity be the day immediately following the firſt Monday after Michaelmas. That, the entries, in the minute or memorandum-book of the ſteward, prove only that he aſſiſted his memory in recollecting the time of holding the court, by referring it to Pack-Monday. That it was natural, from this *accidental* connection between the two days, for the people of Milborne Port to call the court-day Pack-Tueſday. That if they had any *neceſſary* connection, it would have appeared by entries in the court-books in ſome ſuch terms as theſe, "*At a court holden on the firſt Tueſday after Pack-Monday, or Sherborne fair*;" but that no ſuch entry is to be found. That there can be no reaſonable dependency or relation between a court-leet holden at Milborne Port, in the county of Somerſet, and a fair holden at three miles diſtance, in the county of Dorſet. That if the lord of the manor were to forfeit that fair, it would be abſurd to ſuppoſe, that this ſhould work a forfeiture of the court-leet, yet *that* muſt be the conſequence, if the only legal computation of the day for holding it, muſt be taken from the day on which the fair is kept. That it is evident that the exception of ſection 1, and the proviſion of ſection 4, of the ſtatute, only mean courts of pie-powder, or other courts of that ſort, neceſſarily depending on fairs.

That, as to the ſuppoſed occaſionality of the court for appointing Newton and Peckham, there was no foundation for

(8) *Supra*, p. 51.

for ſuch an objection. That the Committee would not give any credit to the teſtimony of John Ames; and, if the ſtatute of Geo. II. had been hitherto miſunderſtood at Milborne Port, it was proper to ſet right the error as ſoon as it was diſcovered; and that it had never been the cuſtom to give any previous notice of the holding of the court.

(☞ This was proved by the witneſſes. It only appeared that a common warrant uſed to be ſent to the bailiff to ſummon a jury.)

That it could never be the meaning of the ſtatute of the 7th and 8th Will. III. if the precept was dilivered to the returning officer of any borough, and he ſhould go out of office, and another be appointed legally, between that and the time of the election, that the new officer ſhould not execute the precept. That he is, in the eye of the law, the ſame officer with the former, and the ſtatute only meant, in order to prevent litigation and delay at an election, to fix who was to execute the precept, when there ſhould be different perſons claiming to be returning officers at the ſame time, under different titles. That, ſince the ſtatute of Will. III, there have been many inſtances of precepts received by one returning officer, and executed by his ſucceſſor, and the legality of ſuch execution has never been diſputed, even when the election has been controverted (B).

That it did not appear, that the office of conſtable and that of ſub-bailiff are incompatible.

(☞ The witneſſes only ſwore, that they had never known any inſtance of the ſame perſon holding both at the ſame time.)

But that if they are, ſtill, if the court was illegal, the appointment of Oliver to be conſtable was equally void with the appointment of the two new ſub-bailiffs, and, therefore, ſuch void appointment did not diveſt him of his office of ſub-bailiff.

That Oliver did not abdicate that office; he only acted as one doubtful of the law, concerning the legal time of holding the court; and, in the uncertainty of this point, continued in the exerciſe of his former office, by taking the poll at the election. That, once the jury choſe him conſtable,

ſtable, if he had refuſed to be ſworn, he was liable to be indicted, fined, or amerced. That Oliver, therefore, if Newton and Peckham were not legally appointed, was as much a returning officer as Baunton was. That he joined in the notice for the election with Baunton, took a poll, and made a return. His return, therefore, was equally valid with that of Baunton.

The counſel for Walter and Browne, in reply, inſiſted,

That there was nothing abſurd in ſuppoſing an original connection between Sherborne fair, and the court-leet at Milborne Port, although the two places are ſituated in different counties. That, in former times, the grants of the crown uſed to extend very commonly into different counties, and the fair and court at firſt might have made part of the ſame grant.

That it is not true, that if a fair were forfeited, a court *uſually holden with it*, but belonging to another perſon, would be ſo likewiſe. That the forfeiture of one perſon could not affect the right and property of another. That the old preſcriptive day for holding the fair would ſtill continue to be the guide for fixing the preſcriptive day for the court-leet. That preſcriptive rights are of too high a nature to be loſt by the alteration of a ſubject with which they are collaterally connected. That this is proved by the following inſtance; there is a ſtatute of Hen. VI. (9) which enacts, that all fairs and markets holden on certain feaſts, or on Sundays, ſhall ceaſe, on pain of forfeiture of the goods expoſed to ſale, to the lord of the franchiſe, or liberty, yet long afterwards, in the reign of queen Elizabeth, it was determined, that a man, in pleading, might preſcribe to a fair to be holden on a Sunday (1) (C).

But that, if the court in queſtion ſhould not be conſidered, by the Committee, to be within the meaning of the fourth ſection of the ſtatute of Geo. II. yet it could not be brought within the proviſion of the firſt ſection, for, by that ſection, the new days for holding the courts there mentioned, muſt be eleven days ſooner than the former days, on which they uſed to be holden, and the firſt Tueſday of October, new ſtyle,

(9) 27 Hen. VI. cap. 5. § 1.
(1) Cro. Eliz. p. 485. Comyns *v.* Boyer.

ſtyle, will ſometimes be more, and ſometimes leſs, than eleven days ſooner than the firſt Tueſday of the ſame month, old ſtyle: That, for inſtance, in the laſt year, 1774, the firſt Tueſday of October, new ſtyle, was the fourth day of the month, new ſtyle, and the firſt Tueſday, old ſtyle, was the eighteenth of the month, new ſtyle; that is, at a fortnight's interval. That the court-leet, therefore, at which Newton and Peckham were appointed, was a fortnight ſooner than the day on which it would have been holden, if there had been no change of the ſtyle, and, conſequently, not according to the proviſion of the ſtatute. That, at moſt, this was a *caſus omiſſus*, not provided for by the ſtatute, and the court muſt be holden on the old preſcriptive day, without any reference to the alteration of the ſtyle (D).

That, as to Oliver's return, it was undoubtedly bad; and, if the Committee were to put that of Baunton on the ſame footing with it, they muſt hold them to be both void.

The Committee having cleared the court, deliberated among themſelves; and the counſel being again called in, the Chairman acquainted them, that the Committee had reſolved,

"That the return made by John Newton, jun. and John "Peckham, of Mr. Luttrel and Mr. Wolſeley, was an "illegal return.

"And that the other two returns appeared to the Com- "mittee to be ſo complicated together, that they thought it "their duty to go upon the merits of the election, without "previouſly deciding between them."

The counſel for Walter and Browne now went into the whole that remained of their caſe, viz.

The majority of legal votes.

The bribery by Luttrel and Wolſeley, or their agents (2);

And Luttrel's ineligibility.

The numbers on Baunton's poll ſtood as follow,

For Walter and Browne	—	62
For Luttrel and Wolſeley	—	58
Majority for Walter and Browne	—	4

On

(2) *Vide infra* Caſe of St. Ives, Note (B).

On Oliver's poll, the numbers were;

For Luttrel and Wolſeley	--	86
For Walter and Browne	—	37
Majority for Luttrel and Wolſeley	—	49

They propoſed to add 5 to Walter and Browne's votes on Baunton's poll:

And to take off 11 (3) from the votes for Luttrel and Wolſeley.

The numbers then would ſtand thus:

For Walter and Browne	—	67
For Luttrel and Wolſeley	—	47
Majority for Walter and Browne	—	20

In like manner, they propoſed to add 30 for Walter and Browne on Oliver's poll;

And to take off 39 from the votes for Luttrel and Wolſeley. The numbers then would correſpond with the other poll.

They contended, that there are *nine* commonalty ſtewards, who are entitled to vote under the laſt determination of the Houſe.

The other voters rejected by Oliver, and which they meant to re-eſtabliſh, had been refuſed as fraudulent inhabitants, or fraudulently rated.

And the votes for Luttrel and Wolſeley whom they meant to ſtrike off from both polls, were objected to on the ſame grounds.

They alſo objected to one of Luttrel and Wolſeley's voters as lying under a conviction of felony.

Having gone through their evidence concerning the votes which they meant to add to, or ſtrike off from, the two polls, they proceeded to produce evidence on the head of bribery; and to ſhew that Luttrel held a diſqualifying office. When they had finiſhed, and ſummed up their evidence;

The

(3) In the minutes this is ſtated to be 10, but then the numbers on the two corrected polls would not correſpond.

The counſel on the other ſide went firſt upon their objections to the voters claiming as commonalty ſtewards.

They next objected to 23 votes received by Baunton for Walter and Browne, 5 of which were alſo admitted by Oliver.

Then they endeavoured to ſupport the votes which had been objected to on the other ſide.

☞ In order to make the numbers on the two polls correſpond, after their propoſed alterations, we muſt ſuppoſe that they allowed 7 of the votes for Walter and Browne on Baunton's poll, which were not admitted by Oliver. If ſo, by their calculation, the numbers ought to have been,

For Luttrel and Wolſeley	—	86
For Walter and Browne	—	39
Majority for Luttrel and Wolſeley	—	47

After this, they proceeded to remove the imputation of bribery from Luttrel and Wolſeley, and to fix bribery on the other two candidates.

Laſtly, they anſwered the objections to Luttrel's eligibility; and after they had ſummed up their caſe,

The counſel on the other ſide replied.

On the queſtion concerning the commonalty ſtewards, the facts, and the arguments on both ſides were as follow:

On the part of Walter and Browne, a book was produced, by the Rev. Mr. John Taylor, curate of Miſborne Port, and one of the commonalty ſtewards, containing the accounts of the commonalty ſtewards concerning the management of their eſtates, their diſburſements, and the elections to fill up vacancies. The book commenced in 1762. He knew of no other book of a prior date. By ſeveral entries in this book, it appeared, that there were *nine* perſons deſcribed as commonalty ſtewards. That when one died, or reſigned, another was elected in his ſtead, and the entry of the election ſigned, ſometimes by five, ſometimes by ſeven perſons, ſtyling themſelves *ſtewards*. The two who are appointed annually, are in this book denominated *preſiding ſtewards*. The whole are ſometimes called the *Homage*, and ſeven of them *Aſſiſtants*, in contradiſtinction to the two preſiding ſtewards.

By

By the Journals, 8 Dec. 1702, in the caſe when the laſt determination of the Houſe was made, it appears, that one party contended, that the right of election was "In the inhabitants paying a yearly rent to the queen-dowager, "and not receiving alms," and, that the other alledged, that it was, "In the *nine* capital bailiffs, their two deputies, "in the *nine* commonalty ſtewards, and in the inhabitants "paying ſcot and lot."—The former does not ſeem to have denied the number of commonalty ſtewards to be nine, or to have given any evidence to contradict it.

William Burgler, aged 62, who had lived the principal part of that time at Milborne Port, and John Noakes, aged 61, who had been born, and lived there, ſwore that they always underſtood that the nine had a right of voting, and had voted; and the former ſaid they voted whether they were inhabitants or not. That, when the two ſub-bailiffs were in different intereſts, he had known them rejected by one of them, but never by both the ſub-bailiffs.

On the other ſide, they read the entry in the Journals of 14 March 1648-9. containing the report of the Committee of privileges and elections, on the controverted election between Medlycot and French, by which it appears, that ſome of the ſeven claiming to be commonalty ſtewards, and to vote, having been rejected, and Mr. French, in whoſe intereſt they were, having petitioned, the old books were examined, and, it appearing, that they were there denominated the *Aſſiſtants*, or *the Homage*, parole evidence was offered to prove them commonalty ſtewards, but was rejected by the Committee (4).

They then produced two returns, one of 1681, the other of 1695, to each of which there were the names of two perſons deſigned as commonalty ſtewards, and *only* two; and alſo certain leaſes granted by the two, called, by them, the only commonalty ſtewards, without the concurrence of the other ſeven.

The counſel for Walter and Browne argued thus:

It is very clear, ffrom the ſtate of the caſe in 1702, as it has been cited from the Journals, that the Houſe muſt have referred to the number of commonalty ſtewards ſtated by the

(4) Journ. vol. xxv. p. 790. col. 1.

the one party, and not controverted by the other, in the determination of the right of election; for, the right being alleged to be in *nine* capital bailiffs, and in *nine* commonalty ſtewards, &c. the Houſe decided it to be, in the capital bailiffs, and in the commonalty ſtewards, &c. without defining the number of either. Thoſe general words are allowed to relate to the number of nine capital bailiffs; why ſhould they not alſo, in the caſe of the commonalty ſtewards, relate to the ſame ſpecified number?

The general reputation in the place, and the entries in the book produced by Mr. Taylor, prove, that all the *nine* are equally entitled to vote as commonalty ſtewards.

On the other ſide, they relied on the evidence they had produced.—They ſaid:

It is pretty evident that the book, beginning in 1762, has been contrived on purpoſe to eſtabliſh the right of *all* the nine, and there is no other way of accounting for the loſs of all the books antecedent to that date, but by ſuppoſing them ſecreted and deſtroyed, that they might not be evidence againſt it.

On the queſtion of the rates, it appeared, that ever ſince the year 1772, there had been great ſtruggles, between Mr. Medlycot and Mr. Walter, about the appointment of overſeers of the poor. Several of the appointments had been quaſhed by the court of King's Bench, and two, of two ſets of overſeers, which had been made by the different parties at the ſame time, viz. Eaſter 1774, were then before that court.

(☞ They were afterwards quaſhed, 28 January, 1775, pending the ſitting of this Committee.)

Upon theſe facts, the Committee propoſed that the following queſtion ſhould be argued by the counſel, viz.

"Whether perſons *rateable*, and having *paid* to the rate, "though that rate were made and collected by officers ille-"gal, or doubtful, may vote as inhabitants paying ſcot and "lot."

The counſel for Walter and Browne contended that they may.

They ſaid, that ſcot and lot exiſted long before overſeers of the poor, or poor-rates were known to the law of England,

land, (which is only ſince the ſtatute (5) of the 43d year of queen Elizabeth); and for this they appealed to the definitions in Spelman's Gloſſary (6). That the deſcription therefore of perſons paying ſcot and lot could not depend on the regular appointment of officers according to the rules laid down by that ſtatute. That the poor-rate indeed was in common caſes very properly taken to be the rule for diſcovering who are to be conſidered as perſons paying ſcot and lot; but that the right of ſuch perſons to vote is ſo far from being created by the poor-rate, that it is neither neceſſarily connected with, nor alterable by it (E).

But, as to rates made by illegal overſeers, they argued, that the overſeer is a mere inſtrument; and, therefore, any *miniſterial* act done by him ſhall not be avoided, becauſe the title, which he had to the office, was bad. That, on this principle, admiſſions on ſurrenders, made by a lord of the manor, continue to be good, though he himſelf be afterwards ouſted, on a defect in his title exiſting previous to ſuch admiſſions, whereas immediate grants made by him are void. That, in like manner, admiſſions of burgeſſes, in boroughs, by illegal mayors, or aldermen, are good, where the burgeſſes were admitted under a precedent title, but they are void where the admiſſions were on election; the mayor or aldermen acting, in the firſt caſe, merely in a miniſterial capacity; in the ſecond, as voluntary electors.

The counſel for Luttrel and Wolſeley took a diſtinction on the word "*doubtful*" in the queſtion, as propoſed by the Committee. If it meant to refer to inſtances where there had been but one rate, and one ſet of overſeers, though, perhaps, the appointment and rate might be afterwards queſtioned, and ſet aſide, there they thought the votes would be good, but not, as in the preſent caſe, where the appointment and rate were, at the time of making them, diſputed, and oppoſed by another appointment and another rate. In ſuch caſe they ſaid they conceived, that, upon the queſtion of the legality being judicially determined, the rate made by the illegal overſeers being bad, the money would be recoverable by thoſe who had paid under that rate, and they would be in the ſame ſituation as if they never had been rated or had paid.

They

(5) 43 Eliz. cap. 2.
(6) Titles Scot and Lot.

They denied, that parish officers were mere instruments acting *ministerially* in making the rates.

And they alledged, that the relation now between scot and lot, and the poor-rate is such, that, if there were no rate, there would be no scot and lot, because there would be no parish expences to be borne.

The Committee, after clearing the court, and deliberating on the question,

Resolved, That persons *rateable*, and "*having paid to the* "*rate*, though that rate be made by officers illegal, or "doubtful, have a right to vote *as inhabitants paying scot and* "*lot* (F)."

And they directed the counsel to confine themselves in their evidence (concerning the particular votes objected to on this head) to their rateability, without entering into the legality of the appointment of the overseers.

This point of law being decided by the Committee, the discussion of each particular vote became in a manner a distinct cause, turning merely on the matter of fact. For the reasons therefore given in the Introduction (7), I have omitted all that part of the case, as well as what concerned the bribery of the parties, or their agents, as there was no question of law on that subject. On this occasion, and in the succeeding cases when the circumstances happen to be similar, I desire to adopt the words of the Committee of privileges and elections, in the case of Coventry, 24 Feb. 1701-2, where they say, in their report to the House, "That the evidence relating to the disqualifying and justi- "fying of voters being very particular, it is conceived more "proper to refer to the minutes taken at the Committee, "than to transcribe the same, and make a long report, "which, after the determination of the election, can be of "no use (8)."

With regard to the person objected to, as under a conviction of felony (one James Hiscox), a copy of the conviction was produced by a witness, who had compared it with the original; and another swore to his identity.

It was contended, on the part of Luttrel and Wolseley, that a person in this situation may vote for a member of Parliament.

(7) *Supra*, p. 20.

(8) Journ. vol. xvi. p. 763. col. 1.

On the head of Mr. Luttrel's ineligibility, it appeared from the evidence of Mr. Charles Hartford, the perſon who executes the office, he was ſuppoſed to hold, as deputy, that it is the place of *Cuſtomer inwards in the Port of Briſtol*. That it ſtands in the name of one Mr. Smith, who reſides in Ireland; and the accounts are always made out in his name. He ſaid, he paid the profits (amounting to between three and four hundred pounds a year) to Luttrel, conſidering him as agent for Smith. That he had ſeen a power of attorney from Smith to Luttrel, authorizing him to appoint a deputy for him, and that he had received a deputation from Luttrel as attorney for Smith, but that, afterwards, that deputation being found to be improper, he had deſtroyed it, and had received his deputation (which was produced and read) directly from Smith. That he thought, from this tranſaction, that there was ſuch a connection between Smith and Luttrel, as made it ſafe for him to pay the money to Luttrel; but that he never conſidered whether the payments he had made to Luttrel were ſtrictly legal, and he thought that, if Smith were to die, he would be liable to pay the arrears of the profits to his executors. He ſaid he was appointed by Mr. Luttrel's intereſt.

On the part of Walter and Browne it was contended,

That Smith's holding the office was merely colourable. That Luttrel received the profits, and was, in ſubſtance, the perſon who poſſeſſed the office, and that he was thereby incapable of being elected ſince the ſtatute of the 12th and 13th of William III. (G) (9).

On the other ſide they argued,

That, ſuppoſing Mr. Luttrel to be poſſeſſed of the office, yet he was capable of being *elected*, and if he were to reſign, after the election, might *ſit and vote*. That there is a clear difference between the ſtatutes of the 12th and 13th of William III. and the 6th of Anne (1). That (G) by the latter, perſons holding the Offices which are there ſpecified, are not only declared to be incapable of *ſitting*, but of being *elected*, and, if they are elected, the election is made void; but, in the ſtatute of William, there is no clauſe to make a perſon holding a place in the cuſtoms, incapable of being *elected*, or

(9) Cap. 10. §. 89, 90.
(1) Cap. 7. §. 25, 29.

or the election of him void. Accordingly, they ſaid, that, in the caſe of Sir. Richard Allin, who, having an office in the cuſtoms when he was choſen for Dunwich, had ſurrendered it before he took his ſeat, the Houſe, 9 Feb. 1708-9, reſolved, that he ſhould be admitted to take his ſeat (2) (H).

But they ſaid, it was unneceſſary for them to urge this point, as no evidence had been given to ſhew that Mr. Luttrel had any beneficial intereſt in the place.

The following queſtions of evidence aroſe in the courſe of the cauſe.

When John Ames was called to prove the declarations of Medlycot concerning the return (3), his evidence on that head was objected to.

It was contended, that Medlycot was not a party to the petition, and that his declarations could not affect the cauſe of Luttrel and Wolſeley.

The other ſide alledged, that he was avowedly the perſon on whoſe intereſt they ſtood, and was to be conſidered as an agent for them.

The court was cleared, and the Committee, after deliberation,

Reſolved to admit the evidence.

Mr. Medlycot was propoſed to be called, to contradict the teſtimony of Ames, but being objected to, after argument, and clearing the court, the Committee

Reſolved, that his evidence ſhould not be received.

One of the preſiding commonalty ſtewards (the Rev. Mr. Taylor) being aſked a queſtion touching the right of the nine commonalty ſtewards to vote, this was objected to;

And the queſtion waved; he having a contingent intereſt to maintain their right of voting.

John Coxe Hippeſley, Eſq; barriſter, being called on the ſubject of Mr. Luttrel's office, refuſed to anſwer any queſtions which might affect him, as he had conſtantly acted as his confidential adviſer and counſel.

The Committee took ſeveral days to conſider of the merits of this election, after the counſel had cloſed their evidence and arguments.

(2) Journ. vol. xvi. p. 98. col. 2. and p. 99. col. 1.
(3) *Supra*, p. 51.

On Friday the 10th of February, their Chairman *informed* the Houſe, " That the Committee had *determined*,

" That Edward Walter, Eſq; is not duly elected a burgeſs to ſerve in this preſent Parliament for the borough of Milborne Port in the county of Somerſet.

" That Iſaac Hawkins Browne, Eſq; is not duly elected a burgeſs to ſerve in this preſent Parliament for the ſaid borough.

" That the Hon. Temple Luttrel is duly returned a burgeſs, to ſerve in this preſent Parliament for the borough of Milborne Port in the county of Somerſet, *by the return executed by Elias Oliver*.

" That Charles Wolſeley, Eſq; is duly returned a burgeſs to ſerve in this preſent Parliament for the ſaid borough, by the return executed by the ſaid Elias Oliver.

" That the Hon. Temple Luttrel is duly elected a burgeſs to ſerve in this preſent Parliament for the borough of Milborne Port in the county of Somerſet.

" That Charles Wolſeley, Eſq; is duly elected a burgeſs to ſerve in this preſent Parliament for the ſaid borough of Milborne Port (I)."

The ſaid determinations were ordered to be entered in the journals of the Houſe, and the deputy-clerk of the crown was ordered to attend immediately, with the ſeveral returns for this borough:

And to take off the file the indenture of return, by which Edward Walter, Eſq; and Iſaac Hawkins Browne, Eſq; were returned; and alſo the indenture of return executed by John Newton and John Peckham, by which the Hon. Temple Luttrel and Charles Wolſeley, Eſq; were returned:

Which was done accordingly (4).

(4) Votes, 10 Feb. p. 204, 205.

NOTES

NOTES

ON THE CASE OF

MILBORNE PORT.

PAGE 55. (A) 7 and 8 Will. III. cap. 25. § 1. "The "officer to whom the writ is ſent, ſhall, by himſelf, or agent, "deliver, or cauſe to be delivered, the precept to the proper "officer of every borough, town corporate, port, or place, to "whom the execution of ſuch precept doth belong or apper- "tain, and to no other perſon whatſoever, and *ſuch* officer "upon the back of the ſame precept, ſhall indorſe the day of "the receipt thereof, in the preſence of the party from whom "he received ſuch precept, and ſhall forthwith cauſe publick "notice to be given of the time and place of election, and "ſhall proceed to election thereupon, within the ſpace of eight "days next after his receipt of the ſame precept, and give "four days notice, at leaſt, of the day appointed for the elec- "tion."

P. 57. (B) I have heard of ſeveral inſtances where this happened, at the laſt general election, particularly at Sudbury; yet, when that election was brought before a Committee, though the miſconduct of the officer who made the return, was one ground of the petition, it was never contended that he was not the Perſon who ought to have had the execution of the precept.

P. 58. (C) Comyns *v.* Boyer, Croke Eliz. p. 485. "The "defendant in his plea, alledgeth the preſcription to be to hold "a fair there every year upon the 29th of Auguſt, and he doth "not except Sunday as it ought to be.—But this objection was "not allowed for a fair, holden upon the Sunday is well enough; "although by the ſtatute (27 Hen. VI. cap. 5. § 1.) there is a "penalty inflicted upon the party that ſells upon that day, "but it makes it not to be void."

Nota. The ſtatute abſolutely ſays, "That all manner of "fairs and markets, on the principal feaſts therein ſpecified, "and Sundays, and Good Friday *ſhall ceaſe*, on pain of for- "feiture of the goods expoſed to ſale, to the lord of the fran- "chiſe

" chiſe or liberty;" and it grants, " That when there was no " other day to hold the fair, but ſuch on which it was now " prohibited, it may be holden, by ſtrength of the old grant, " within three days next, before or after the ſaid feaſts, " giving proper notice to the common people." The four Sundays in harveſt are excepted from the prohibition of the ſtatute.

P. 59. (D). This does not ſeem to be concluſive. The true meaning of the firſt ſection ſeems to be that, where a court was holden *according to* a given day, before the ſtatute, it ſhall now be holden *according to* another day, eleven days ſooner, i. e. *according to* the ſame *nominal day* as formerly. Thus this court being holden *according to* the firſt of October, old ſtyle, *before* the act, would now be holden *according to* the ſame *nominal day*, viz. the firſt of October, new ſtyle; that is, *according to* a day, eleven days previous to the day *according to* which it was formerly holden.

P. 64. (E) What it is *to pay ſcot and lot*, or *to pay ſcot, and bear lot*, is no where exactly defined. There is nothing very diſtinct or ſatisfactory, in what we find in Spelman, on this ſubject. It only appears, from the authorities cited there, that thoſe expreſſions were in uſe, as far back as the Conqueſt. It is probable that, from ſignifying ſome ſpecial municipal or parochial tax and duty, they came in time to be uſed, in a popular ſenſe, to comprehend generally the burthens to which the inhabitants of a borough, or pariſh, as ſuch, were liable. If the *original* ſignification were *that*, in which thoſe terms are uſed in the reſolutions of the Houſe of Commons, it is very clear that the proviſions of the ſtatute of Queen Elizabeth, could neither regulate, nor aſcertain, who are *payers of ſcot and lot*. But all the determinations of the right of election are poſterior to the reign of Queen Elizabeth, and we muſt ſuppoſe that the Houſe in thoſe determinations, made uſe of " *ſcot and lot*" in the general popular ſenſe, for, when they were made, I believe, no ſpecial tax or duty was known by thoſe names *.

We are therefore to underſtand, that, by perſons *paying ſcot and lot*, the Houſe meant thoſe perſons whoſe circumſtances are ſufficiently independent to enable them to contribute, in general, to ſuch taxes and burthens as they are liable to, as inhabitants of the place; and, ſeeing the poor-rate, ever ſince the 43d year of Queen Elizabeth, has been the moſt conſiderable and

* In Scotland, when a perſon petitions to be admitted a burgeſs of a royal borough, he engages that he will " *ſcot and lot*, watch and ward." &c. Caſe of Linlithgow in the Houſe of Lords, 10 April 1775.

and permanent local tax, the payment of *that* affords such a presumption, that the person paying is in a situation to contribute to the rest, as to have been constantly taken for the criterion of the right to vote, whenever that right is similar to what it is in Milborne Port. The statute for regulating elections in the city of London, (11 Geo. I. cap. 18. § 9.) ascertains, in a very particular manner, how the legislature understood what it was to *pay scot* in that city, and corroborates what I have just said on this subject.

P. 65. (F) This decision of the Committee is consonant to the determinations of the courts of law, in settlement cases.

"And though the rate be in form, or in the manner of "making it, not strictly legal, but void; yet if the party be "rated, and pay to such a rate, he shall gain a settlement." Burn's Justice, Title, Poor, Settlement by Rates, p. 385.

"But a man must be rated, and must pay, to gain a settlement." *Ibid.* p. 384.

P. 66. (G) 12 and 13 Will. III. cap. 10. § 89. "No member of the House of Commons shall be capable of being "a commissioner or farmer of the customs, or of holding or "enjoying in his own name, or in the name of any other person in trust for him, or for his use and benefit, or of executing by himself, or his deputy, any office, place, or employment, touching, or concerning the farming, collecting, or "managing the customs."

§ 90. "If a member of the House of Commons, shall, "during the time of his being a member of Parliament, by "himself, or his deputy, or any other in trust for him, or for "his benefit, take, enjoy, or execute, any office, place, or "employment touching, or concerning the farming, collecting, "or managing the customs, such person is hereby declared and "enacted to be absolutely incapable of sitting, voting, or acting, as a member of the House of Commons in such Parliament."

For sect. 25 and 29 of 6 Anne, cap. 7. see the Case of North Berwick, &c. *infra*.

In the Commentaries on the Laws of England, it is laid down, that no officer of the customs is capable of *being elected*, vol. I. p. 175, 4to. Yet the case of Sir Richard Allin (Note H) seems to prove the contrary.

P. 67. (H) "The House being acquainted that Sir Richard "Allin, lately adjudged to be duly elected a burgess to serve "in this present Parliament, for the borough of Dunwich, "desires the opinion of the House (before he takes his place) "upon the clause in the act of Parliament of the 12 and 13 of "Will.

" Will. the IIId. (intituled an act for granting an aid to his " majeſty, for defraying the expence of his navy, guards, and " garriſons, for one year, and for other neceſſary occaſions) " which relates to the officers of the cuſtoms, in regard he was, " by letters patent granted by King Charles the IId. dated " the 31ſt day of May in the 30th year of his reign, made (by " the name of Richard Anguiſh) collector of the great and " petty cuſtoms in the port of Yarmouth, for his life; but " ſurrendered ſuch office the 7th day of February inſtant, which " was acknowledged and *enrolled* the next day. And a motion " being made, and the queſtion being put, that the debate be " adjourned, it paſſed in the negative, 170 to 106. Then the " letters patent and ſurrender were produced, and the ſurren- " der read. Reſolved, That the ſaid Sir Richard Allin be ad- " mitted to take his ſeat in this Houſe." Journ. vol. xvi. p. 98. col. 2. p. 99. col. 1.

The merits of the election had been determined on the 5th of February, *ibid.* p. 94. col. 1. Sir Richard Allin was one of the petitioners, and no objection was taken to him as poſſeſſed of this office, on that occaſion.

P. 68. (I) By this, and the following Caſes of Morpeth, " Weſtminſter, Hindon, and Downton, the reader will ſee the forms, in which the determinations of Committees are communicated to the Houſe, in the different inſtances of double and of falſe returns, and when the deciſion on the merits of the election is either in favour of the ſitting members, or petitioners, or the election is declared to be void.

II.

THE

CASE

Of the BOROUGH of

MORPETH,

In the County of NORTHUMBERLAND.

The Committee was choſen on Tueſday, the 24th of January, and conſiſted of the following Gentlemen.

Lord Fred. Campbell, Chairman,	Members for	Glaſgow, &c.
Thomas Foley, Eſq. - -		Herefordſhire.
Hon. William Howe, - -		Nottingham.
Richard Combe, Eſq. - -		Aldboro. Suff.
Sir John Barrington, Bart. -		Newton, Hants.
Viſcount Wenman, - -		Oxfordſhire.
Sir Charles Cocks, Bart. -		Ryegate.
Richard Milles, Eſq. - -		Canterbury.
Filmer Honywood, Eſq. -		Steyning.
Molyneux Shuldham, Eſq. -		Fowey.
Chriſtopher Griffith, Eſq. -		Berkſhire.
James Whitſhed, Eſq. - -		Cirenceſter.
Sir Thomas Miller, Bart. -		Lewes.
NOMINEES.		
Of Mr. Byron.		
Sir Charles Bunbury, Bart. -		Suffolk.
Of Mr. Eyre.		
Lord Advocate of Scotland, -		Peebleſhire.

PETITIONERS.

The Honourable William Byron.

Certain Freemen, and Electors of the Borough of Morpeth.

Sitting Member.

Francis Eyre, Eſq.

COUNSEL.

For the Petitioners.

Mr. Kenyon, Mr. Lee.

For the Sitting Member.

Mr. Mansfield, M. Widmore.

THE CASE

Of the BOROUGH of MORPETH.

ON Tueſday, the 6th of December, 1774, two petitions had been preſented to the Houſe.

One, of Mr. Byron, ſetting forth; That, at the laſt election, when Peter Delmé, Eſq; Francis Eyre, Eſq; Thomas Charles Bigge, Eſq; and the petitioner, were candidates for the borough of Morpeth, Mr. Delmé and the petitioner, at the concluſion of the poll, had the majority of legal votes, in the judgment of the two bailiffs, who preſided, and are the proper returning officers, and who accordingly declared them duly elected; but that they were afterwards compelled, by the violence and threats of a numerous, and outrageous mob, to ſign a return of Mr. Eyre, inſtead of the petitioner, together with Mr. Delmé; praying, therefore, that the name of Mr. Eyre might be eraſed from the return, and the petitioner's inſerted inſtead thereof; and to give him ſuch other relief as the caſe required, and the Houſe ſhould think reaſonable.

Another, of certain freemen, and electors of the borough, to the ſame purpoſe; and likewiſe praying that ſuch puniſhment ſhould be inflicted upon the offenders, as to the Houſe ſhould ſeem meet.

They were ordered to be taken into conſideration on Tueſday, the 24th of January, 1775 (1).

On

(1) Votes, p. 17, 18.

On Monday, the 19th of December, a petition of Mr. Bigge was preſented, ſetting forth; that a majority had been obtained for Mr. Delmé, by the corrupt and illegal practices of Mr. Delmé, and Mr. Byron, and the partiality of the returning officers, in rejecting the petitioner's votes; and that he ought to have been returned; and praying that he might be declared duly elected together with Mr. Eyre, or receive ſuch relief as to the Houſe ſhould ſeem meet.

And alſo a petition of ſeveral aldermen, and free burgeſſes of Morpeth, containing ſimilar allegations, and praying, in like manner, that Eyre and Bigge ſhould be declared duly elected, and the rejected votes, legal votes.

They were ordered to be taken into conſideration at the ſame time with the two former, on the 24th of January (1).

But, on Friday, the 23d of December, a motion was made, that the Order for hearing the two laſt mentioned petitions on the 24th of January along with the two former, ſhould be diſcharged; which, after a debate on the ſubject, was ordered to be done, and a new day, viz. the 12th of July 1775, was appointed for the conſideration of thoſe petitions (2).

Hence, only the merits of the two firſt petitions were referred to the Committee choſen on the 24th of January.

And there appearing, at the opening of the cauſe, ſome doubt among the counſel, whether the ſole queſtion was, the freedom and the validity of the return of Mr. Eyre, or, whether they might not go into the merits of the election; the Committee were reminded, by one of the members, that this had been already decided in the Houſe; and the court being cleared; after deliberation, they reſolved, that the counſel muſt confine themſelves ſolely to the return; and in the courſe of the evidence, they would not ſuffer any queſtions to be put that reſpected the merits.

The counſel for the petitioners were going to call one of the returning officers, to prove that they had been compelled by force to make a falſe return.

His evidence was objected to.

It was ſaid, that he came to excuſe and explain a return, as falſe, which he had given under his hand and ſeal as true; that, if it were a falſe return, he was liable to an action, and therefore intereſted in giving any account of it.

To

(1) Votes, p. 96. (2) Votes, p. 111, 112.

To this it was anſwered, that the maxim, that a man ſhall not be admitted to prove his own turpitude, is neither true in law, nor if it were, could apply here; and that nothing ſaid by the returning officer on the preſent occaſion could be produced, either for or againſt him, in an action for a falſe return.

The Committee over-ruled the objection:

And it was proved by the clerk to the returning officers who took the poll, by the returning officers, and by a great many other witneſſes, that at the cloſe of the poll, the majority was, and was declared to be, in favour of Delmé and Byron; that the bailiffs were proceeding to make a return of them, when they were forced by open violence, and a juſt apprehenſion of immediate danger, both on the evening of the election, and next morning, when the return was executed, to ſign a return of Eyre and Delmé.

It was alſo proved, that Mr. Eyre, on the morning of the election, before it began, made a very inflammatory ſpeech to the people. That after the riot began, he having retired ſome time before, the returning officers ſent him word, they would return whom he pleaſed: And that an anſwer being brought them, that they muſt return himſelf and Delmé, they complied, on which the riot ceaſed. That he inſiſted, the day following, that one of the returning officers ſhould deliver the return to one of his partizans, and neither carry it himſelf, nor accompany the other, while he ſhould carry it, to the ſheriff; and that, on one of the returning officers refuſing to comply with ſome demand of his, he ſaid "*if you don't*," and then looked round to the mob, implying, as he (the returning officer) thought, that if he did not, the mob would compel him.

The counſel for the petitioners inſiſted that the Committee ought to make a ſpecial report againſt the perſons concerned in the riot, that the Houſe might proceed againſt them, as had been done in other caſes of the ſame ſort; and they cited the caſe of Coventry, 20 November 1722, when all the perſons principally concerned in a riot at an election there, were ordered into cuſtody (4) (A).

The

(4) Journ. vol. xx. p. 60. col. 2.

The Committee, however made no ſpecial report.

On Friday the 27th of January, their Chairman informed the Houſe, that they had determined,

" That Francis Eyre, Eſq; is not duly returned a burgeſs, " to ſerve in this preſent Parliament, for the borough of " Morpeth, in the county of Northumberland.

" That the Honourable William Byron, the petitioner, " ought to have been returned a burgeſs, to ſerve in this " preſent Parliament for the ſaid borough of Morpeth."

And their determinations were ordered to be entered in the Journals of the Houſe:

And the return to be amended, by eraſing the name of Mr. Eyre, and inſerting that of Mr. Byron, in its place (5):

Which was done accordingly.

At the ſame time an order was made,

" That Francis Eyre, Eſq; and the freemen and electors " of the borough of Morpeth, in the county of Northum- " berland, be at liberty to petition this Houſe, to queſtion " the election of the Hon. William Byron, within fourteen " days next, if they think fit (6).

And, accordingly, on Wedneſday, the 8th of February, a petition of Mr. Eyre was preſented to the Houſe, to the ſame effect with thoſe of Mr. Bigge, and of the aldermen, &c. of Morpeth; and charging Mr. Byron and Mr. Delmé directly, with bribery by themſelves and agents.

Which petition was alſo appointed to be taken into conſideration on the 12th of July (7).

(5) Votes, p. 155, 156.
(6) Votes, p. 157.
(7) Votes, 196, 197, *Vide ſupra*, p. 75.

NOTES

NOTE

ON THE CASE OF

MORPETH.

P. 76. (A) "Reſolved, That it appears to this Houſe, "that there were notorious and outrageous riots, tumults, "and ſeditions, at the late election of citizens to ſerve in "Parliament for the city of Coventry, in defiance of the civil "authority, and in violation of the freedom of elections, cauſ- "ed by the agents and friends of the petitioners, who were the "authors, contrivers, and promoters of the ſaid riots, tumults, "and ſeditions.——Reſolved, That it appears to this Houſe, "that Charles Buggs was one of the principal contrivers, and "promoters, of the riots, tumults, and ſeditions, at the late "election of citizens to ſerve in Parliament for the city of "Coventry." Then follows an order for taking him into the cuſtody of the ſerjeant at arms; and ſimilar reſolutions, and orders, relating to eight other perſons, by name. Journ. vol. xx. p. 60. col. 2.

III.

THE

CASE

Of the CITY and LIBERTY of

WESTMINSTER.

The Committee was choſen on Wedneſday, the 25th of January, 1775, and conſiſted of the following Gentlemen.

Lord Charles Spencer, Chairman,	Members for	Oxfordſhire
Anthony Eyre, Eſq.		Boroughbridge
Charles Ogilvy, Eſq.		Weſt-Looe
Viſcount Chewton,		Newcaſt. und. l.
Hugh Owen, Eſq.		Pembroke
James Scawen, Eſq.		Surrey
Sir Robert Barker, Knt.		Wallingford
Sir Matthew White Ridley, Bart.		Newcaſtle
Thomas Brand, Eſq.		Arundel
William Drake, jun. Eſq.		Agmondeſham
Benjamin Langlois, Eſq.		St. Germain's
George Bridges Brudenell, Eſq.		Rutlandſhire
William Adam, Eſq.		Gatton
NOMINEES, *Of the Petitioners.*		
George Johnſtone, Eſq.		Appleby
Of the Sitting Members.		
Sir Richard Sutton, Bart.		St. Alban's

PETITIONERS.

Henry Morres, Lord Viſcount Mountmorres, in the Kingdom of Ireland, and ſeveral other Inhabitants, Electors of the City and Liberty of Weſtminſter.

Sitting Members.

Earl Percy. Lord Thomas Pelham Clinton.

COUNSEL.

For the Petitioners.

Mr. Lee, Mr. Wilſon.

For the Sitting Members.

Mr. Mansfield, Mr. Hargrave.

THE

THE CASE

Of the CITY and LIBERTY of WESTMINSTER.

ON Thurſday, the 26th of January, the Committee being met, the petition was read, ſetting forth; That, at the late election for the city and liberty of Weſtminſter, the petitioner Lord Mountmorres, Charles Stanhope, commonly called Lord Viſcount Mahon, Hugh Percy, commonly called Earl Percy, Thomas Pelham Clinton, commonly called Lord Thomas Pelham Clinton, and Humphrey Cotes, Eſq; being candidates, the king's menial ſervants not having proper houſes of their own within the city of Weſtminſter, gave voices in the ſaid election, contrary to an expreſs reſolution of the Houſe; that divers peers and lords of Parliament, publickly canvaſſed, and otherwiſe unduly interfered in the election, contrary to ſeveral expreſs reſolutions of the Houſe; that during the election, after the teſte and iſſuing out of the writ, Lord Percy and Lord Thomas Pelham Clinton, by themſelves, or agents, were guilty of bribing, corrupting, and entertaining the voters; and that they allowed to the electors, and ſeveral perſons who had, or claimed a right to vote, money, meat, drink, entertainment, or proviſion, and that by thoſe, and other undue means, a majority of votes was procured for Lord Percy and Lord Thomas Pelham Clinton, and they were returned; and

and praying ſuch relief as upon examination ſhould appear juſt (1).

There is no general determination of the Houſe of the right of election in Weſtminſter.—But it ſeemed to be agreed to be, "In the inhabitants, houſeholders, paying "ſcot and lot."

The reſolution of the Houſe concerning the king's menial ſervants, referred to in the petition, is as follows.

15 Nov. 1680. Reſolved, "That the king's menial ſer-"vants, not having proper houſes of their own within the "city of Weſtminſter, have not right to give voices in the "election of citizens to ſerve in parliament for the ſaid "city (2).

And the following reſolution, reſpecting the interference of peers, in the election of members of the Houſe of Commons, has been renewed at the beginning of every ſeſſion ever ſince the 3d of January 1701-2 (3).

Reſolved, "That it is a high infringement on the liber-"ties and privileges of the Commons of great Britain, for "any lord of Parliament, or any lord lieutenant of any "county, to concern themſelves in the elections of members "to ſerve for the Commons in Parliament."

The numbers on the poll, ſtood thus:

For Earl Percy — —	4994
For Lord Thomas Pelham Clinton	4744
For Lord Mountmorres —	2531
For Lord Mahon — —	2342
For Humphrey Cotes, Eſq. —	130

The counſel for the petitioners ſaid, it was not their intention to contend that the majority was not in favour of the ſitting members; but, that they would prove the different allegations of the petition, by which it would appear, that the rights of election had been invaded, in a manner highly alarming, ſo as to call for the interpoſition and cenſure of the Houſe, which they hoped would take place on the report of the Committee.

They however were not able to prove any direct ſolicitation of any peers. A letter had been ſent from lord Exeter's ſteward, in the country, to his porter in London, de-

 ſiring

(1) Votes, 12 Dec. 1774. p. 68, 69.
(2) Journ. vol. ix. p. 654, col. 1.
(3) Journ. vol. xiii. p. 648, col. 1. Votes, 5 Dec. 1774. p. 6.

ſiring him to aſk certain votes for the ſitting members. The porter himſelf gave evidence of this, and that he had ſo done; but it did not appear that the ſteward had acted by lord Exeter's orders.

It was proved that the duke of Northumberland had *called on* ſome of the lower claſs of voters, during the election.

It appeared, that there had been conſultations of Lord Thomas Pelham Clinton's friends about opening houſes, but no treating at *his* expence was proved. On the contrary, they had abandoned that deſign as unſafe. Very nearly the ſame, on this head, came out concerning the duke of Northumberland. A letter was produced, in his name, to a man who keeps a publick-houſe, beſpeaking his houſe; but it appeared that this letter was not in the duke's hand-writing, and the perſon himſelf proved, that the duke had afterwards told him, that no houſe was to be opened for his ſon.

There was no evidence of bribery, that came home to the ſitting members.

It was proved, and hardly denied by the counſel on that ſide, that about nineteen perſons, under the deſcription of the reſolution of 1680, had polled for the ſitting members. They had all been ſolicited for their votes by Lord Mountmorres and Lord Mahon. They were inhabitants of the Mews, and their houſes had of late, for the firſt time, been rated to the pariſh, on which account they claimed to be electors; but they acknowledged that their rates were paid by the King.

Theſe being the principal facts proved on the part of the petitioners, the counſel for the ſitting members inſiſted, that the petition was frivolous, and vexatious, and ought to be ſo reported to the Houſe (A).

But on Friday, the 27th of January, the Committe, by their Chairman, informed the Houſe, *generally*, that they had determined,

"That the Right Hon. Hugh Percy, commonly called "Earl Percy, is duly elected a citizen, to ſerve in this "preſent Parliament, for the city of Weſtminſter.

"That the Right Hon. Thomas Pelham Clinton, com-"monly called Lord Thomas Pelham Clinton, is duly "elected

" elected a citizen, to ſerve in this preſent Parliament, for " the city of Weſtminſter."

And Lord Thomas Pelham Clinton, having been likewiſe choſen a burgeſs for the borough of Eaſt Retford, in the county of Nottingham, made his election to ſerve for the city of Weſtminſter (1) (B).

(1) Votes, p. 155.

NOTE

ON THE CASE OF

WESTMINSTER.

PAGE 82. (A) 13 February 1700-1, the following reſolution was firſt made (Journ. vol. xiii. p. 326. col. 2, 327. col. 1.) and has been renewed ever ſince, at the beginning of every ſeſſion (Votes, p. 5.)

" Reſolved, That where this Houſe ſhall judge any peti-
" tion touching elections to be frivolous and vexatious, the
" Houſe will order ſatisfaction to be made to the perſon peti-
" tioned againſt."

But before the firſt date of that reſolution, as well as ſince, there are caſes, where the Houſe has ordered the petitioners to pay the coſts and expences of the perſons petitioned againſt. This will appear by the following inſtances taken from the Journals.

CASES of Frivolous and Vexatious Petitions.

I. Case of Southwark.

27 December 1695. The committee of privileges and elections having reported to the Houſe their opinion, that the petition of Sir George Meggot, Knight, complaining of an undue election for the borough of Southwark, in the county of Surry, " was vexatious, frivolous, and groundleſs," and it having alſo appeared, from the evidence reported by the committee, that he had ſcandalized the Houſe; the Houſe came to theſe two reſolutions, viz.

" Reſolved, That Sir George Meggot, having preferred to
" this Houſe, a groundleſs and vexatious petition, relating to
" the election of members to ſerve in this preſent Parliament,
" for the borough of Southwark, and having ſcandalized this
" Houſe in declaring that, without being duly choſen, he had
" friends enough in this Houſe, to bring him into this Houſe,
" be taken into the cuſtody of the ſerjeant at arms, attending
" this Houſe.

" Reſolved, That Sir George Meggot do make ſatisfaction
" to the members of this Houſe he petitioned againſt, for the
" coſts

" coſts and expences they have been put unto, by reaſon of " ſuch petition." Journ. vol. xi. p. 371. col. 1.

II. Case of Totness.

4 March 1695-6, " Reſolved, That Sir Richard Gipps, " having preferred to this Houſe a frivolous, vexatious, and " groundleſs petition, relating to the election of members to " ſerve in this preſent Parliament, for the borough of Totneſs, " in the county of Devon, be taken into the cuſtody of the " ſerjeant at arms, attending this Houſe-"

" Reſolved," &c. in the ſame words as the ſecond reſolution in the caſe of Southwark. Journ. vol. 490. col. 1.

III. Case of Ipswich.

3 February 1710-1. The Committee of privileges and elections having reported their reſolution, that the petition of William Thomſon, Eſq. complaining of an undue election, for the borough of Ipſwich, in the county of Suffolk, was frivolous, and vexatious; the Houſe, on a diviſion (195 to 113), agreed to it.

" Ordered, That William Thomſon, Eſq. do make ſatis- " faction to Sir William Baker, for," &c. in the words of the ſecond reſolution in the two firſt caſes. Journ. vol. xvi. p. 478. col. 1, 2.

IV. Case of Shrewsbury.

27 May 1714. " Reſolved, That the petition of J. P. &c. " and ſeveral othnrs whoſe names are thereunto ſubſcribed, " burgeſſes of, and inhabitants in, Shrewſbury, complaining " of an undue election and return of Edward Creſſet, Eſq. is " frivolous, vexatious, and ſcandalous."

" Ordered, That the ſaid petitioners do make ſatisfaction," &c. as above, vol. xvii. p. 650. col. 1.

V. Case of the diſtrict of Kilrenny, Anstruther Easter, Pittenween, Anstruther Wester, and Crail.

20 December 1722. " Reſolved by the Committee, and " agreed to by the Houſe, (without a diviſion) That the peti- " tion of David Scot, Eſq. complaining of an undue election " and return of Philip Anſtruther, Eſq. to ſit in this preſent " Parliament, for the ſaid diſtrict of boroughs, is groundleſs, " frivolous, and vexatious."

" Ordered, That David Scot, Eſq." &c. as above. Vol. xx. p. 87. col. 2.

VI. Case of Aylesbury.

21 March 1764. The petition of Thomas Scrope, Eſq. complaining of an undue election, for the borough of Ayleſbury, in the county of Buckingham, having been referred to the com-

mittee of privileges and elections; they reported, that no perſon appearing to proſecute the petition on the part of Mr. Scrope, they had come to two reſolutions; one, that the ſitting member (Anthony Bacon, Eſq.) was duly elected; the other, the petition of Thomas Scrope, Eſq. was frivolous and vexatious. The Houſe agreed to the firſt. An amendment was propoſed to the ſecond, by leaving out the words (*and vexatious*), which was agreed to, without a diviſion; and then the ſecond reſolution, ſo amended, was agreed to. Journ. xxix. p. 972. col. 1.

It does not appear, in any of the above caſes, in what manner the Houſe enforced the payments they ordered. From the caſe of Ayleſbury, it would ſeem that when a petition is voted to be *frivolous*, without being called *vexatious*; the Houſe will not order the petitioner to pay the coſts.

P. 83. (B) Ever ſince the 11th of May 1661 (Journ. vol. viii. p. 247.) it has been an order repeated at the beginning of every ſeſſion. (Votes, p. 5.)

"That all members who are returned for two or more places, "do make their election by this day three weeks (referring to "the day of the order), provided there be no queſtion upon "the return for that place."

When there is, the practice is, that the perſon who is returned for more than one place, ſhall make his election as ſoon as his return which was controverted, is affirmed; but I do not find that there is any rule fixing a particular day for that purpoſe.

IV. THE

IV.

THE

CASE

Of the BOROUGH of

HINDON.

In the County of WILTS.

The Committee wos choſen on Tueſday, the 31ſt of January, and conſiſted of the following Gentlemen.

Thomas Dundas, Eſq. Chairman,	Members of	Orkney and Zetl.
Samuel Marſh, Eſq. - -		Chippenham
Gerrard William Vanneck, Eſq.		Dunwich
Charles Brett, Eſq. - -		Leſtwithiel
John Aubrey, Eſq. - -		Ayleſbury
Jacob Wilkinſon, Eſq. - -		Berwick
Filmer Honywood, Eſq. -		Steyning
William Wollaſton, Eſq. - -		Ipſwich
Hon. John Vaughan, - -		Berwick
Edward Phelips, Eſq. - -		Somerſetſhire
Benjamin Allen, Eſq. - -		Bridgewater
Richard Benyon, Eſq. -		Peterborough
Hon. Lucius Ferdinand Cary -		Bridport
NOMINEES.		
John Elwes, Eſq. - -		Berkſhire
George Byng, Eſq. - -		Wigan

PETITIONERS.

James Calthorpe, Eſq. and Richard Beckford, Eſq.

Sitting Members.

Richard Smith, Eſq. Thomas Brand Hollis, Eſq.

Counel for the Petitioners.

Mr. Bearcroft, Mr. Lee.

For Mr. Smith.

Mr. Serjeant Davy. Mr. Potter.

For Mr. Hollis.

Mr. Mansfield. Mr. Buller.

THE

THE

CASE

Of the BOROUGH of

HINDON.

ON Wedneſday, the firſt of February, the Committee being met, the petition was read, ſetting forth; That the two ſitting members had, by the bribery of themſelves and agents; previous to, and during the election, procured themſelves to be returned, although the petititioners were duly elected, and ought to have been returned (1).

The laſt determination of the Houſe, of the right of election in this borough, is as follows:

12 April, 1728, "Reſolved, That the right of election of "burgeſſes, to ſerve in Parliament, for the borough of "Hindon, in the county of Wilts, is in the inhabitants of "houſes within the ſaid borough, being houſekeepers, and "pariſhioners, not receiving alms (2)."

The numbers on the poll, were as follow,

For Smith — — —	163
For Hollis — — —	161
For Calthorpe — — —	63
For Beckford — — —	32

The counſel for the petitioners, in opening their caſe, ſtated, that they hoped to bring home ſuch proof of bribery, to all, or the major part, of the voters for the ſitting members, as would annihilate their votes, and leave the majority with the petitioners, or at leaſt, by proving bribery on both the candidates who had been returned, they would diſqualify them from ſitting, and avoid the election.

When

(1) Dec. 6. Votes, p. 19.
(2) Journ. vol. xxi. p. 132. col. 2.

When they had closed their evidence, and arguments, the counsel for the sitting members, endeavoured to justify their clients and their voters, and retorted the charge of bribery on the petitioners, and their voters (3).

The evidence on both sides may be seen in the report, printed by order of the House.

In the course of the evidence produced on the part of the petitioners, a witness was called, to prove bribery, by a *supposed* agent of one of the sitting members. The Committee directed the counsel first to give evidence to establish the agency, before they went into any proof of bribery committed by him (4).

On Monday, the 6th of February, the chairman of the Committee reported, that the Committee reported, that the Committee having met that morning at 10 o'clock, pursuant to their adjournment of the Saturday, and Jacob Wilkinson, Esq; one of the members, not attending, they adjourned till three in the afternoon, and, at the same time, he informed the House, that he had, the day before, received a letter from Mr. Wilkinson, inclosing another from Bath.

Those letters being delivered in at the table, and the receipt of them, and the hand-writing of Mr. Wilkinson verified upon oath, they were read, and the House resolved,

That the excuse alledged by Mr. Wilkinson in his letter should be allowed, and that he should be excused from farther attendance on the Committee; and it was ordered, that the Committee should proceed without him, on the day following at 11 o'clock (5).

The counsel finished on Friday the 10th of February.

On Tuesday, the 14th of February, the Chairman of the Committee informed the House, that they had determined,

"That Richard Smith, Esq; is not duly elected a burgess "to serve in this present Parliament for the borough of "Hindon, in the county of Wilts.

"That Thomas Brand Hollis, Esq; is not duly elected a "burgess to serve in this present Parliament, for the said "borough of Hindon.

"That James Calthrope, Esq; one of the petitioners, is "not duly elected a burgess to serve in this prent Parliament "for the said borough of Hindon.

"That

(3) *Vide infra*, Case of St. Ives, Note (B).
(4) *Vide infra*, Cases of Bristol, and Shaftesbury.
(5) Votes, p. 184, 185.

" That Richard Beckford, Eſq; one of the petitioners, " is not duly elected a burgeſs, to ſerve in this preſent Par- " liament for the ſaid borough of Hindon.

" That the laſt election of burgeſſes, to ſerve in this pre- " ſent Parliament, for the ſaid borough of Hindon, was a " void election (6).

" At the ſame time, Mr. Dundas acquainted the Houſe, " that in the courſe of the examination into the merits of " the petition of James Calthorpe, Eſq; and Richard Beck- " ford, Eſq; it having appeared to the Committee, that the " moſt flagrant and notorious acts of bribery and corruption " had been practiſed; and that a very conſiderable majori- " ty of the electors of the borough of Hindon had been " bribed and corrupted, in a very groſs and extraordinary " manner; and that ſeveral others of ſaid electors had been " concerned as agents for that purpoſe; the Committee, " deſirous that the Houſe may adopt ſuch meaſures as may " diſcourage, and, if poſſible, put an end to a practice ſo ſub- " verſive of the freedom of elections, had directed him to " lay before the Houſe, the whole of the evidence given " before the ſaid Committee, with their opinions thereupon; " and he read the report in his place, and afterwards deli- " vered it in at the table, where the ſame was read; and " the reſolutions of the Committee are as followeth.

" Reſolved, That it appears to this Committee, that " Richard Smith, Eſq; by his agents, has been guilty of no- " torious bribery, in endeavouring to procure himſelf to be " elected and returned a burgeſs, to ſerve in this preſent " Parliament, for the borough of Hindon, in the county of " Wilts."

The like reſolution reſolution reſpecting Mr. Hollis.

" Reſolved, That it appears to this Committee, that " James Calthorpe, Eſq; by his agents, has been guilty of " notorious bribery, in endeavouring to procure himſelf to " be elected and returned a burgeſs, to ſerve in this preſent " Parliament, for the ſaid borough of Hindon.

Reſolved, " That it appears to this Committee, that " Richard Beckford, Eſq; has, by his agent, endeavoured " by promiſe of money, to procure himſelf to be elected, " and returned a burgeſs, to ſerve in this preſent Parlia- " ment, for the ſaid borough of Hindon.

" Reſolved,

(6) Votes, p. 217, 218.

" Reſolved, That it appears to this Committee, that the " Rev. John Nairn, of Hindon; Faſham Nairne, Eſq; late " of Bury-ſtreet, St. James's, Francis Ward, of Sherborne-" lane, London;—Stevens, a butcher, at Saliſbury, com-" monly called Jobber Stevens, &c. (in all, thirteen, ſpecifi-" ed by name) have acted as agents, and have been acceſſa-" ry to and concerned in, the notorious acts of bribery, and " corruption, that have been practiſed at the laſt election " for the ſaid borough of Hindon.

" Reſolved that it is the opinion of this Committee, that " the Houſe be moved, for leave to bring in a bill, to dis-" franchiſe the ſaid borough of Hindon, in the county of " Wilts (7)."

The conſideration of this report was adjourned till the 23d of February and, in the mean time, an order was made, that the Speaker ſhould not iſſue his warrant for a new writ, till the Houſe proceeded to ſuch conſideration (8).

☞ Though the account of the further proceedings of the Houſe relative to this matter, does not come within the ſtrict limits of the preſent deſign, yet, as they were the immediate conſequence of the proceedings of the Committee, the hiſtory of the one would be incomplete without that of the other.

On Thurſday, the 23d of February, the two firſt reſolutions of the Committee, being read a ſecond time, were agreed to by the Houſe; and the third reſolution being read a ſecond time, on the queſtion being put for the Houſe to agree to it, a motion was made that the ſtatute of the 10th of George III. ſhould be read; which was done accordingly, and then the third reſolution was agreed to. When the fourth reſolution was read the ſecond time a debate enſued, and a motion was made, that it ſhould be adjourned for three months, but this paſſed in the negative; and the fourth reſolution (being read a ſecond time) Mr. Dundas moved the Houſe accordingly; and the queſtion being put in the words of the reſolution, the previous queſtion was put," " That " that queſtion be now put," which paſſed in the negative (A).

It was then ordered, that leave be given to bring in a bill to incapacitate from voting at elections of members of Parliament,

(7) Votes, p. 217, 218.
(8) Votes, p. 217, 218.

liament, 100 (9) perſons by name (including ſeveral of thoſe mentioned in the fifth reſolution of the Committee) out of two hundred and ten who had polled at the election; and for the preventing bribery and corruption in the election of members to ſerve in Parliament for Hindon (B).

Mr. Dundas, Mr. Byng, Mr. Elwes, and the other members of the Committee, were ordered to prepare and bring in this bill; and, in the mean time, it was reſolved, That the Speaker ſhould not iſſue his warrant to make out a new writ, for a month longer (1).

On the 8th of March, Mr. Dundas preſented the bill; which was read, and ordered to be read a ſecond time, on the 29th of that month (2). It was of courſe alſo ordered to be printed, and a printed copy of the bill, with the order for the ſecond reading, was ordered to be ſerved on all the perſons named in it; and it was reſolved that leaving them at their reſpective abodes ſhould be good ſervice.

On the 28th, a petition of certain inhabitants of Hindon was preſented to the Houſe, ſetting forth that they obſerved by the Votes, that a bill was depending, by which their rights would be materially affected, and the uſual mode of election for the borough eſſentially altered; that they felt with infinite concern, the cenſure that had been paſſed by a Committee of the Houſe, on many of the electors; but, at the ſame time, relying upon the candour of the Houſe, they hoped it was not intended that they who were innocent, ſhould be included in a puniſhment which, only ought to extend to thoſe who had made an improper uſe of their franchiſe; and praying that they might be heard by themſelves, or counſel, againſt the bill.

This petition was ordered to lie on the table untill the bill ſhould be read a ſecond time (3).

The day following (29th of March) the order of the day being read, and the queſtion being propoſed for reading the bill a ſecond time, the meſſengers who had been charged with the ſervice of the copies of it on the parties, was called to prove ſuch ſervice; and Thomas Spencer, one of the perſons named in the bill, was, at his own deſire, heard on behalf of himſelf, againſt the bill,

Then,

(9) The number in the printed bill is ſtated to be 188, but on reckoning the names, there appears to be a miſtake of two.

(1) Votes, p. 272, 273. (2) *Ibid.* p. 344. (3) *Ibid.* p. 445, 446.

Then, in conſequence of a motion for that purpoſe, the entry in the Journals of the Houſe, of the 22d of March 1722-3, and the 4th of April 1723, of the proceedings of the Houſe upon the bill for inflicting certain pains and penalties upon Francis lord biſhop of Rocheſter, was read a ſecond time; and it was reſolved that it ſhould be conſidered in a Committee of the whole Houſe on the 5th of April, and that the petitioners againſt it ſhould be heard before that Committee, by themſelves or their counſel.

A petition of certain perſons named in the bill was then preſented, complaining that they were aggrieved by being incapacitated by it, and praying to be heard by themſelves or counſel. This petition was alſo referred to the Committee of the whole Houſe, and leave was given to the petitioners to appear againſt it, by themſelves or counſel. After this, on a motion for that purpoſe, the firſt reſolution of the ſelect Committee was read, and a motion was made, and the queſtion put;

"That it be an inſtruction to the ſaid Committee of the "whole Houſe, that they have power to receive a clauſe, "or clauſes, for inflicting a ſuitable puniſhment on the ſaid "Richard Smith, Eſquire, for his ſaid offence."

It paſſed in the Negative.

And the ſecond reſolution being read and a ſimilar queſtion put, reſpecting Mr. Hollis, that, likewiſe, paſſed in the negative (4).

On Friday, the 31ſt of March, the order for the Houſe to reſolve itſelf into a Committee of the whole Houſe, on the 5th of April, on the bill, was diſcharged; and the 10th of April appointed for that purpoſe (5).

On Monday the 10th of April, the order of the day being read, a petition of John Nairn, clerk, was preſented, denying the charges brought againſt him before the ſelect Committee, and praying to be heard, by his counſel, againſt that part of the bill which tended to incapacitate him. This was granted, and his petition referred to the Houſe.

A motion being now made, and the queſtion being propoſed, that the Speaker ſhould leave the chair, the Houſe was moved, that the entries in the Journal of the Houſe, of the 20th of March, 1728-9, and the 3d, 9th, and 12th of April, 1729, of the proceedings of the Houſe with relation to the

(4) Votes, p. 457, 458. (5) Votes, p. 473.

the bill to diſable Thomas Bambridge to hold or execute the office of Warden of the priſon of the Fleet, or to have or exerciſe any authority relating thereto, might be read; which being done, the Houſe reſolved itſelf into a Committee of the whole Houſe, on the bill.

In this Committee, it being propoſed to call certain perſons, named in the bill, and incapacitated by it, to prove the allegations it contained, (for it had been debated, and ſettled in the Houſe, in ſome former ſtage of the buſineſs, that the evidence given before the ſelect Committee, and reported by them, could not be admitted on this occaſion), it was objected that they, being parties, and like defendants in an indictment, could not, without overturning the known rules of law and juſtice, be received as witneſſes in this caſe. This objection produced a debate, and though it was treated as of no weight by ſome gentlemen of the long robe, it was ſtrenuouſly ſupported by others, and proved fatal to the bill; for all the perſons who were capable of proving the facts, and who had proved them before the ſelect Committe, were themſelves offenders, and named in the bill.

When the Speaker reſumed the chair, on a motion of Mr. Dundas, leave was given to bring in a new bill, ſimilar to the former (B), but leaving out the names of certain perſons who were intended to be made uſe of as wittneſſes (6); and Mr. Solicitor-General, Sir George Hay, Mr. Grenville, and Lord George Germaine, together with the members of the ſelect Committee, were ordered to prepare and bring it in.

On Wedneſday, the 12th of April, Mr. Dundas preſented this new bill, which being received, and read the firſt time, the Houſe was moved, that the firſt reſolutions of the ſelect Committee ſhould be read; and this being accordingly done, the 26th day of April was appointed for the ſecond reading. A ſimilar order to what had been made on the former occaſion was now made relative to the ſerving the parties with copies; and orders were made ſeverally, that Francis Mead, Thomas Spencer, John Becket (*baker*), John Becket, ſon of William, John Baldwin, William Crabb, Thomas Penrey, Thomas Richardſon, and Thomas More, perſons named in the former, but omitted in this bill, ſhould attend the Houſe, at the time appointed for the ſecond reading (7).

On

(6) Votes, p. 517, 518, 519. (7) Votes, p. 541, 542.

On Wedneſday, the 26th of April, before the order of the day for the ſecond reading of the bill was called for, ſeveral petitions relative to this buſineſs were preſented to the Houſe.

A petition of Thomas Howell, and others, ſetting forth; that they had been included in the former bill of incapacitation, and were ſo in *that* now depending, and repreſenting to the Houſe "that, as they had done nothing to invade the "ordinary courſe of the laws againſt bribery and corruption, "and had always been forth-coming, and never attempted "to prevent the ſervice of legal proceſs, they hoped no new "or extraordinary mode of proſecution or puniſhment "would be adopted againſt them, by which they might be "deprived of the uſual advantages given by law, in the or-"dinary courſe of trial;" and ſuggeſting that a bill, tending to deprive any ſubject of this realm of his greateſt and deareſt franchiſe, cannot be deemed otherwiſe than a criminal proſecution againſt ſuch ſubject; and that, being once put upon his defence, he cannot legally be called again to anſwer the ſame charge; and that the petitioners had been put to ſo heavy an expence, in defending themſelves againſt the charges contained in the former bill, that they were unable to defray the expences of the neceſſary witneſſes and journies to London, to prove their innocence againſt this ſecond proſecution; praying therefore, that the bill might not paſs into a law; and that they might be heard by their counſel on the matters contained in this petition, and might be admitted, before each was put upon his ſeparate defence, to ſhew cauſe why this mode of proſecution ſhould not be adopted in the preſent caſe againſt them (8).

The general argument in this petition againſt this mode of proſecution, was much enlarged upon in the different debates in the Houſe. It was ſaid, that, for the legiſlature to take upon it the juridical authority, was a delicate and dangerous thing, being an encroachment of one part of the ſtate upon the province of another; that it never ought to be done but on very particular occaſions, where puniſhment by the common courſe of law was not attainable, either on account of the eminence and power of the offender, or for other reaſone; or when the remedy provided by law was not adequate to the offence. That theſe reaſons would appear

(8) Votes, p. 576.

pear to have operated, in all or moſt of the caſes of bills of attainder, bills of pains and penalties, and bills of incapacitation, which are to be met with in the records of Parliament; and for the proof of this, the caſes of biſhop Atterbury, and of Bambridge were cited. That even in the late inſtance of New-Shoreham, (though the proceeding then by bill could not be approved of), the circumſtances were different from thoſe of the preſent caſe, for there the offence was the joint crime of a whole claſs of men acting as the combined members of an illegal ſociety, but that at Hindon, the offences of each individual were ſeparate and diſtinct, and each was liable to a diſtinct proſecution at law, the conſequence of which, if he were convicted, would be, as to the loſs of his franchiſe, exactly the ſame as if he were puniſhed by a bill of incapacitation (9).

The petition was ordered to lie on the table, till the ſecond reading of the bill; the petitioners to be then heard by their counſel againſt the bill.

A petition of the electors not mentioned in the bill, and againſt whom there was no charge of bribery, and who had petitioned the Houſe on the 28th of March, againſt the former bill, was then read, praying to be heard by counſel againſt that part of the preſent bill which related to the alteration of the right of election.

This petition was diſpoſed of in the ſame manner with the one which had juſt been preſented.

Then a third petition from the perſons diſabled by the bill, praying that they might be heard by their counſel, againſt that part of it which related to their incapacitation;

And a fourth, from John Nairn, clerk, to the ſame effect with his former petition of the 10th of April, were preſented, and diſpoſed of in the like manner with the other two.

Laſtly, a petition was preſented from Thomas Howell, and Thomas Dukes, ſetting forth; that they obſerved that ſeveral perſons had been left out of the preſent bill, who were included in the former, for the purpoſe, as they were informed, of being admitted witneſſes, and that they were privy to, and deſirous of giving evidence to the Houſe, of very intereſting and important tranſactions, reſpecting the matters contained in the new bill, which, if diſcovered, and given

(9) Statute 2 Geo. II. cap. 24.

given in evidence, would effectually invalidate the teſtimony of ſome perſons included in the former bill and omitted in this; praying therefore, to have their names ſtruck out of the bill, and to be produced and examined as witneſſes.

This petition was ordered *generally* to lie on the table.

The order of the day being now read, the bill was ordered to be read, and the counſel againſt it (Mr. Pepys for the petitioners incapacitated by the bill, Mr. Bearcroft for the other petitioners, electors of Hindon, and Mr. Macdonald for the Rev. Mr. Nairn) being called in, the bill was read a ſecond time, and the petition of Thomas Howell and others was read, and counſel heard.

The bill was then committed to a Committee of the whole Houſe for the enſuing day, and the ſeveral petitions were referred to that Committee, and the witneſſes ordered to attend (1).

On Thurſday, the 27th of April, the petition of Thomas Howell, and others, praying to be admitted witneſſes, was referred to the Committee of the whole Houſe; and Mr. Elwes, Chairman of that Committee, reporting, that Thomas Howell, on being examined in relation to the non-attendance of Thomas Spencer and John Becket, two of the witneſſes who had been ſummoned, had groſly prevaricated, he was ordered to be committed to Newgate; and afterwards Mr. Elwes reporting, that William Lucas being examined before the Committee, had groſly prevaricated, and given falſe evidence, he was ordered to be committed to the Gatehouſe.

A ſimilar report, and the like order, were made, concerning Henry Chant.

And Mr. Elwes reporting, that Spencer and Becket had attended the day before, in purſuance of an order of the Houſe, but had purpoſely kept out of the way, to avoid being ſerved with the order for their attendance this day, they were ordered to be ſent for in cuſtody of the ſerjeant at arms; and an order being made for the Houſe to reſolve itſelf again, on Tueſday following, into a Committee of the whole Houſe, for the further conſideration of the bill, the orders for the attendance of the witneſſes were renewed (2).

(1) Votes, p. 577, 578, 579.
(2) Votes, p. 586, 587.

On Monday, the 1ſt of May, Thomas Howell was ordered to be removed from Newgate to the Gatehouſe, having petitioned the Houſe for that purpoſe (3).

On Tueſday, the 2d of May, the ſerjeant at arms being called upon, to give an account of what had been done in relation to the taking Thomas Spencer, and John Becket, the meſſengers, who were ſent in ſearch of them, informed the Houſe, that very ſtrict enquiry had been made after them, but that they were not yet taken; upon which the Committee of the whole Houſe, for the conſideration of the bill, was put off till the Monday following, the orders for the witneſſes were renewed, and it being ſuſpected, from the teſtimony given by the perſons who had been committed, that Mr. Smith and Mr. Faſham Nairn had been concerned in ſecreting Spencer and Becket, they were ordered to attend on the Monday (4).

On Monday, the 8th of May, petitions were preſented from Howell, and Lucas, acknowledging their prevarications, which they ſaid were unintentional, but alledging they had declared all they knew concerning Spencer and Becket, and deſiring, on account of their poverty, and their having families to maintain, that they might be permitted to aſk pardon at the bar of the Houſe, and be diſcharged without the payment of fees.

Theſe petitions were ordered to lie on the table.

The like information as on the Tueſday preceding, was given by the meſſengers who had been ſent in ſearch of them, concerning Spencer and Becket.

Mr. Smith and Captain Faſham Nairn were then examined, in relation to the non-attendance of Spencer and Becket; after which, the order of the day for the Committee of the whole Houſe on this buſineſs being read, it was reſolved,

That it appeared to the Houſe, that from the abſence of Spencer and Becket, two material witneſſes in ſupport of the bill, it would not be expedient to proceed further in it, in this ſeſſion of Parliament.

It was then ſeverally reſolved,

That,

(3) Votes, p. 607.
(4) Votes, p. 613.

That the Houſe would take the report of the ſelect Committee who were appointed to try the petition of James Calthorpe, and Richard Beckford, Eſqrs. into further conſideration as early as poſſible, in the next ſeſſion; that until then, no warrant for a new writ ſhould be ordered;

And that an humble addreſs ſhould be preſented to the King, to iſſue a proclamation for apprehending Spencer and Becket, with the promiſe of a reward, ſo that they might be delivered into the cuſtody of the ſerjeant at arms during this ſeſſion of Parliament:

And, this addreſs was ordered to be preſented by ſuch members of the Houſe, as were members of the privy-council.

Then, upon motion for that purpoſe, the firſt reſolution of the ſelect Committee, as agreed to by the Houſe on the 23d of February, was read; and then, upon a motion for that purpoſe, the following entry in the Votes of the Houſe, of the 5th of December laſt, was read.

" Reſolved, That if it ſhall appear that any perſon hath " procured himſelf to be elected, or returned a member of " this Houſe, or endeavoured ſo to be, by bribery, or any " other corrupt practices, this Houſe will proceed with " the utmoſt ſeverity againſt ſuch perſon (5)."

And an order made,

" That the Attorney General do forthwith proſecute " Richard Smith, Eſq; for the ſaid offence."

The ſecond reſolution was read in like manner, and the like order made, that the Attorney General ſhould proſecute Mr. Hollis.

The third reſolution being alſo read, and a motion made, and the queſtion propoſed, that the Attorney General ſhould proſecute James Calthorpe, Eſq; the previous qneſtion was put, and reſolved in the affirmative; and then the like order was made for the proſecution of Mr. Calthorpe.

Laſtly, the fourth reſolution being read, it was ordered, that the Attorney General ſhould likewiſe forthwith proſecute Mr. Beckford (6)

(5) Votes, p. 5. *Vide* Caſe of St Ives, note (B).
(6) Votes, 644, 645, 646, 647.

The addreſs for apprehending of Spencer and Becket was preſented to the King, and the proclamation iſſued (7); but on Thurſday, the 11th of May, they ſurrendered themſelves, and, it being ſeverally reſolved by the Houſe, "That they had purpoſely abſconded, in order "to avoid being ſerved with an order for their atten-"dance, as witneſſes, on a Committee of the Houſe," they were ordered to be committed to Newgate (8)

(7) Votes, p. 660.
(8) Votes, p. 672, 673.

NOTES

NOTES

ON THE CASE OF

HINDON.

PAGE 91. (A) It appears, by the Journals, that in 1702, in a caſe not unlike the preſent, a bill was brought in for diſfranchiſing this borough, and for transferring the right of chooſing two members of Parliament, to all the freeholders of the Hundred where the borough lies, excepting ſuch of them as had a right to vote for the borough of Downton. On this occaſion, a petition from ſome of the inhabitants of Hindon was preſented, in oppoſition to the bill, and was referred to the Committee appointed to prepare and bring it in. On the 8th of February 1702-3, the bill paſſed the lower Houſe; but it dropt in the Houſe of Lords. Journ. vol. xiv. from p. 5, col. 1. to p. 184. col. 1. *paſſim*.

P. 92, 94. (B) There were different plans propoſed for diſpoſing of the two ſeats in Parliament, in caſe it had been thought proper to disfranchiſe the borough of Hindon entirely. Some thought this a fair opportunity of beſtowing *actual* repreſentatives on one of thoſe great manufacturing towns, ſuch as Mancheſter or Birmingham, which have not hitherto had any members of their own. But others were of opinion, that, inſtead of an act of favour, this would in truth be an injury, as all the expence, diſſipation, and diſſenſions, which are too often the attendants and conſequences of elections, would be thereby introduced in the place of œconomy, ſobriety, and induſtry. Another project was, to give the right of chooſing two additional members to the freeholders of the county at large. The objection to this was, that it would be an innovation on the conſtitution, by altering the balance between the *provincial* and *municipal* repreſentation: that ſuch examples become dangerous precedents, and therefore ought to be avoided. A third ſcheme was, to give the right ſolely to the freeholders of the Hundred, but *that* was, in a degree, liable to the ſame objection; and, as either of the three deſigns would have deprived the preſent unbribed electors of Hindon, and all ſucceeding inhabitants, of a very valuable franchiſe, which they

they had done nothing to forfeit, the propoſal of a bill for an intire disfranchiſement was rejected, and a clauſe was put into both the incapacitating bills, leaving the right of election as formerly, but communicating that right, jointly with the former, to a new claſs of electors. Who they were to be, was not filled up in either of the bills; however, as both were formed on the model of the New Shoreham act (11 George III. cap. 55), ſo moſt of thoſe who ſupported them, were for following the proviſion of that act, in beſtowing the joint right on the freeholders of forty ſhillings a year within the Hundred.

V. THE

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THE

CASE

Of the BOROUGH of

DOWNTON,

In the County of WILTS.

The Committee was choſen on Friday, the 3d of February, and conſiſted of the following Gentlemen.

Sir John Hynde Cotton, Bart. Chairman,	Members for	Cambridgeſh.
Richard Aldworth Neville, Eſq.		Grampound
Charles Morgan, Eſq.		Breconſhire
Edward Roe Yeo, Eſq.		Coventry
Sir George Robinſon, Bart.		Northampton
Hugh Owen, Eſq.		Pembroke
Lord Adam Gordon		Kincardineſhire
Lucy Knightley, Eſq.		Northamptonſhire
Rowland Holt, Eſq.		Suffolk
Edward Gibbon, Eſq,		Leſkeard
Hon. Booth Grey,		Leiceſter
John Dodd, Eſq.		Reading
Joſeph Bullock, Eſq.		Wendover
NOMINEES, *Of the Petitioners.*		
Sir Richard Sutton, Bart.		St. Alban's
Of the Sitting Members.		
Fletcher Norton, Eſq.		Carliſle

PETITIONERS.

Sir Philip Hales, Bart, and John Cooper, Eſq.
Certain Freeholders of the borough of Downton.

Sitting Members.

Thomas Duncombe, Eſq. Thomas Dummer, Eſq.

COUNSEL.

For Sir Philip Hales, and Mr. Cooper.

Mr. Mansfield, Mr. Lee.

For the Freeholders Petitioners.

Mr. Hardinge.

For the Sitting Members.

Mr. Serjeant Davy, Mr. Maddocks.

THE

THE CASE

Of the BOROUGH of DOWNTON.

ON Saturday, the 4th of February, the Committee being met, the petitions were read, ſetting forth; That ſeveral perſons were allowed to vote, at the laſt election of burgeſſes for this place, who had no right, by which means a pretended majority was procured in favour of Duncombe and Dummer, and they were returned, although the petitioners, Hales and Cooper, had a clear majority of legal votes (1).

In the petition of Hales and Cooper, there was likewiſe a charge of bribery againſt the ſitting members; but this not being inſiſted on before the Committee, the only queſtion was, concerning the right of the different perſons who had polled at the election, to vote.

There is no determination of the Houſe of Commons, of the right of election in Downton.

The numbers on the poll, as produced by Edward Poore, Eſq; the ſteward and returning officer, were;

For Mr. Duncombe	22
For Mr. Dummer	22
For Mr. Cooper	11
For Sir Philip Hales	10

The counſel for the ſitting members, on the opening of the cauſe, would not admit any general rule as to the right of voting; but both ſides, in their arguments, conſidered it to be, "In perſons having a freehold intereſt in burgage tene-"ments holden by a certain rent, fealty, and ſuit of court, "of

(1) Votes, 6 Dec. p. 19. 19 Dec. p. 97, 98.

" of the biſhop of Wincheſter who is lord of the borough, " and paying reliefs on deſcent, and fines on alienation."

The counſel for the petitioners objected to nineteen or twenty of the voters for the ſitting members.

One general objection, which applied to moſt of them was occaſionality.

It was proved, that the conveyances to ſome were made in 1768, but that the deeds had remained ever ſince that time in the hands of Mr. Duncombe (who is proprietor of near two thirds of the burgage tenements in Downton ;) that the occupiers had continued to pay their rents to him, and expected to do ſo when they became due again, conſidering him as their landlord, and being unacquainted with the grants made by him to the voters ; and that there were no entries on the court-rolls of 1768, of thoſe conveyances, nor of the payment of the alienation fines.

The conveyances to others appeared to have been *printed* at the expence of Mr. Duncombe, and executed after the writ and precept had iſſued, ſome of them being brought wet to the poll. The grantees did not know where the lands contained in them lay, and one man at the poll produced a grant for which he claimed a vote, which on examination, appeared to be made to another perſon.

Mr. Duncombe, at the poll, forbad the voters to anſwer any queſtions about their conveyances. The conſideration in them all was five ſhillings. The rent twenty ſhillings a year. They were, by leaſe and releaſe, for life, with a clauſe of re-entry, if the grantee ſhould aſſign without the conſent of the grantor.

It appeared, that the practice of making ſuch conveyances about the time of an election, had long prevailed in the borough, and that the votes ſo made, are known by the name of *faggots*. Mr. Poore, the returning officer, and father-in-law to the petitioner Cooper, and Mr. Hayes (formerly member for Downton) declared, that they had always conſidered thoſe *faggots* as bad votes. Mr. Poore acknowledged that on a former occaſion he had, to oblige Lord Feverſham, then proprietor of great part of the borough, voted under one of thoſe conveyances, but he ſaid he had, to him, expreſſed his doubts of the legality of ſuch votes. He has been returning officer ever ſince 1745. A witneſs (one John Quinton) aged 78, remembered a conteſted election 47 years ago, when *faggots* were polled on both ſides, but there

was

was no petition then; nor in 1747, when the only conteſt happened which (till that before the Committee) has been in Downton for 30 years paſt. Then too, *faggots* were polled on both ſides.

Mr. Poore ſaid, that, ſince he had known the borough, the perſon who had the prevailing intereſt and property there, and was therefore ſure of a majority of undeniable votes, had always at the time of an election, a number of thoſe *faggots* ready, to provide againſt any attack, upon that ground, from another quarter.

Such being the ſubſtance of the evidence upon this head, it was contended for the petitioners,

That the votes in queſtion, were colourable, fraudulent and void, both by the common law of Parliament, and the ſtatute of William III. commonly called the *ſplitting act*.

They argued as follows:

The *ſtatutes* againſt occaſional freeholders in counties (1), and in boroughs that are counties of themſelves (2), and againſt occaſional freemen (3), do not make any expreſs proviſion concerning burgage tenure boroughs; but that votes plainly fraudulent, and occaſional, are bad by *the common law of Parliament*, is evinced by a variety of caſes. In the very caſe which gave riſe to the ſtatute againſt occaſional freemen, the Houſe, before the ſtatute paſſed, determined all the new votes to be bad (4); and in that of Stafford, February 1724-5, the Houſe reſolved,

"That perſons made burgeſſes of the borough of Stafford, "in the county of Stafford, ſince the death of John Dol- "phin, Eſq; late member of Parliament for the ſaid bo- "rough, not being ſons of burgeſſes, or not having ſerved "ſeven years apprenticeſhip within the ſaid borough, had "not a right to vote in the late election of a burgeſs to "ſerve in this preſent Parliament for the ſaid borough (5)."

In like manner in the caſe of Wareham, 19 January 1747-8 (6), (after the two ſtatutes againſt the votes of occaſional freeholders for counties, and boroughs that are counties of themſelves,) the Houſe determined the right of election to be as follows;

"Reſolved,

(1) 18 Geo. II. cap. 18. §. 3.
(2) 19 Geo. II. cap. 28.
(3) 3 Geo III. cap. 15.
(4) Journ. vol. xxix. p. 337. col. 2.
(5) Journ. vol. xx. p. 391. col. 2.
(6) Journ. vol. xxv. p. 481. col. 2.

" Reſolved, that the right of election of burgeſſes to ſerve " in Parliament for the borough of Wareham, in the county " of Dorſet, is only in the mayor and magiſtrates of the ſaid " borough, and in ſuch of the inhabitants of the ſaid bo- " rough as pay ſcot and lot, and in the freeholders of lands " and tenements there, who have been, *bona fide*, to their " own uſe, in the actual occupation, or in the receipt of the " rents and profits, of ſuch lands or tenements, for the ſpace " of *one whole year next before the election*, except the ſame " came to ſuch freeholders by deſcent, deviſe, marriage, " marriage-ſettlement, or promotion to ſome benefice in the " church (A)."

Nay there was no particular limitation to occaſionality at common law. Votes clearly fraudulent, and made merely for the purpoſe of an election, were bad though of a date more than a year anterior to the election. This appears from the caſe of Weymouth, and Melcombe Regis, 3 June, 1714, where votes of *three years* ſtanding, being occaſional, were determined to be void (4). If that period is fixed by the ſtatutes juſt mentioned, they are to be conſtrued to mean that perſons claiming to vote, who have become freeholders or freemen within the year, ſhall be preſumed and holden to have become ſo for the purpoſe of the election, without enquiry, and their votes rejected; but they do not preclude an enquiry into the fraudulency or occaſionality of votes, though of more than a year's ſtanding. Be this however as it may, with regard to the ſpecies of votes which are the direct objects of thoſe ſtatutes, ſuch votes as are not mentioned in them, as votes for burgage tenures, muſt continue ſubject to the ſame objections as formerly. They may be occaſional, though not mentioned in thoſe ſtatutes, becauſe occaſionality has been proved to exiſt independent of the ſtatutes. Perhaps occaſionality and fraud are to be *preſumed* without enquiry, even with regard to them, when they have been made within the year, by an analogy to the proviſion of the 3d of George III. againſt occaſional freemen, ſimilar to the analogy to the ſtatute of the 19th of George II. which the Houſe ſeems to have followed in their deciſion in the abovementioned caſe of Wareham. But certainly, if they are clearly *proved* to be fraudulent, they will be void, though of a date more

(4) Journ. vol xxvii. p. 665. col. 2. *Vide* the Caſe of Haſlemere, *infra*.

more than a year preceding the election. Upon the whole, it being proved that the conveyances in queſtion, carried no beneficial intereſt; that they were neither followed by poſſeſſion of the eſtates, or even of the deeds; (and it is laid down in Levinz, p. 146, that the continuance of the grantor, in poſſeſſion, is a badge of fraud), nor by attornment of the occupiers; and, that no act of ownerſhip whatever has been exerciſed by the grantees, both the votes under the conveyances of 1768, and thoſe immediately preceding the laſt election, as well as the conveyances themſelves, are fraudulent and void. Indeed, nothing but a conſcioufneſs of the fraud could have induced Mr. Duncombe to forbid the voters to anſwer any queſtions relating to their conveyances. To the laſt claſs, there is another objection.—The writ of election, and precept, can only have in view thoſe electors who exiſt at the time when they iſſue; and therefore voters, whoſe titles accrue afterwards, cannot exerciſe their right at that election (5).

That thoſe votes were bad, by the ſtatute of king William, will appear from examining the ſeventh ſection of that ſtatute (6), which is as follows:

" All conveyances of any meſſuages, lands, tenements, or " hereditaments, in any county, city, borough, town cor- " porate, port or place, in order to *multiply* voices, or to ſplit " and divide the intereſt in any houſes or lands, among ſe- " veral perſons, to enable them to vote at elections of mem- " bers to ſerve in Parliament, are hereby declared to be " void and of none effect, and no more than one ſingle voice " ſhall be admitted for one and the ſame houſe or tene- " ment."

It has been ſhewn, that the conveyances in queſtion were made *in order to multiply voices*; they are therefore void by the ſtatute, and the votes claimed under them muſt, *a fortiori*, be void.

Beſides the general objection of occaſionality, fourteen of the votes for the ſitting members were impeached for reaſons drawn from the nature of burgage tenements.

They defined a burgage to be " one undivided and indi- " viſible tenement, clearly deſcribed, neither created, nor " capable of being created, within time of memory, which " has immemorially given a right of voting."

It

(5) See the caſe of Briſtol, *infra*.

(6) 7 and 8. Will. III. cap. 25, §. 7.

It appeared that, in the borough of Downton, there are burgages, which have been immemorially diſtinct tenements giving a right to vote, known by the different names of *burgages*, *half-burgages*, and *quarters of burgages*. That the rent which has always been paid to the lord for a whole burgage is one ſhilling, for half a burgage ſix pence, and for a quarter of a burgage three pence. That a *quarter of a burgage*, or *half a burgage*, are technical terms, and not expreſſive of the fourth parts, or the halves of whole burgages, but of diſtinct and ſeparate tenements of various extent, and apparently only ſo called becauſe the quit-rents they pay to the lord are halves or quarters of what whole burgages pay. By the pipe-roll of 1458, the amount of all the burgages in the borough is ſtated to be 126 and three quarters, and the rent 6l. 6s. 2d. (☞ There muſt be a ſmall miſtake here. It ſhould be 6l. 6s. 9d.—)There is an old book of precedents and forms for holding the court for the borough, where the burgages are ſtated at 127 and three quarters. And by a preſentment of the jury of 1677, the number is 120 and three quarters; which, if we ſuppoſe the (o) to have been written by miſtake inſtead of (6) will correſpond with the pipe-roll. There are court books exiſting from the 11th of James the firſt, to the 6th of Charles the firſt, and from the 13th of Charles the ſecond, to the preſent time. In theſe, all the entries from the 11th of James the firſt, to the 28th of Charles the ſecond, are of burgages, half-burgages, or quarters of burgages. After that date, there are entries of tenements ſome fractions above a half or a quarter, as of $\frac{5}{12}$ths; the rent 7d. and of $\frac{1}{3}$d. the rent 4d. but of none under a quarter.

Six of thoſe who voted for the ſitting members claimed under conveyances from Mr. Duncombe, each of a quarter of a burgage of land, in what is called Legg's Farm.—It appeared that Legg's Farm is entered in the court-books as paying ten ſhillings rent to the lord; it muſt therefore have conſtituted ten of the ancient whole burgages; but no traces could be ſhown of any part of it having formerly conſiſted of quarter burgages. It came in its preſent form, by meſne aſſignments, from one Mr. Legg to the Duncombe family; and no boundaries or diviſions can now be diſcovered ſeparating it, even into diſtinct whole burgages. No attempt to divide it into quarters can be found before 1708.

Four

Four voted under conveyances of quarters of burgages of land in Butr's Cloſe, a piece of ground paying four ſhillings rent, and therefore conſiſting of four whole burgages.—This came entire to the Duncombe family in 1700, and there are no houſes, or diviſions of the land, into diſtinct tenements.

One voted for a quarter of a burgage of land in Farr's Farm—This, conſiſting of five burgages and a half of land was ſold by one Farr to Mr. Duncombe's family, 21 of April, 1708, and there is paid for it five ſhillings and ſix pence. There are no diviſions in this land.

One voted for a quarter of a burgage of land in Dawe's Farm.—This was ſold in 1708 by one Dawe to the Duncombe family, as two burgages; it pays two ſhillings. There is no trace of its having ever contained ancient diſtinct quarters of burgages.

Two perſons, of the name of Eyre, voted for a tenement which is under one roof, and pays only ſix pence. Before it came into their hands this tenement belonged to one Wyche, an attorney at Saliſbury; and though two families lived in it in his time, there was never more than one vote given for it.

From this evidence the counſel for the petitioners contended,

That theſe fourteen votes, not being for ancient quarters of burgages carrying immemorially a right of voting, but for quarters of burgages attempted to be newly carved out of larger tenements, and ſo ill deſcribed in the conveyances that it would be impoſſible to ſay what part of thoſe larger tenements paſſed, muſt, according to the nature of burgage tenure votes, be bad, and ought to be rejected; that, as to the votes of the two Eyres, their tenement had never before been underſtood to carry two votes; that if it had, it is improbable a man of Wyche's profeſſion would have ſuffered one of them to lie dormant.

The vote of one Roſe was objected to, becauſe the property was without the borough, and this vote was given up by the other ſide.

On the part of the ſitting members the facts which were proved by the witneſſes called by the petitioners, were not diſputed; but it was contended for them, in anſwer to the objections of fraud, and occaſionality,

That all the conveyances were good, and had paſſed the property to the grantees, and therefore had carried the right of voting to thoſe grantees. They ſaid:

Mr.

Mr. Duncombe's advice to the voters not to anſwer any queſtions, proves nothing: they were not obliged to anſwer any. If the grantees had at any time demanded the deeds of Mr. Duncombe, and he had refuſed them, they could have maintained an action of *trover* for them. The Chancellor, if a bill were filed, would compel a delivery of them. They might have taken poſſeſſion of the land, or have brought ejectments. They might now recover the profits which have been perceived by Mr. Duncombe, in actions *for money had and received to their uſe*. The validity of ſuch grants, as againſt the grantor, was determined by the preſent Chief Juſtice of England, in the caſe of the aſſignees of Metivier, a bankrupt, againſt Deviſme. There, though the defendant had made a transfer to the bankrupt of India ſtock merely for the purpoſe of making a vote, it was holden that the aſſignees were entitled to the ſtock. But it is ſaid, that thoſe conveyances are fraudulent, as againſt the other voters of the borough,—as againſt the petitioners; and that the votes are occaſional and void. This has not been proved by any parallel caſe of burgage tenure votes. The practice has prevailed, for a long courſe of years, in this borough, of making ſuch votes, and till now has never been called in queſtion. Fraud is where the parties pretend to do ſomething, which in fact they do not: that is not the caſe here. Nothing which by law a man has a right to do, can be ſaid to be fraudulent. If thoſe conveyances were to be called a fraud on the other electors, it might as well be ſaid, that the ſuffering a common recovery, by a tenant in tail, is a fraud on the donor. Why did not the legiſlature, when they made ſtatutes, firſt againſt occaſional freeholders in counties, then againſt ſuch freeholders in boroughs that are counties, and laſtly againſt occaſional freemen, extend the ſame proviſion to burgage tenures? It cannot be ſaid that they were overlooked. There are about twenty-nine burgage tenure boroughs in England. Is it not evident that they were purpoſely omitted in thoſe ſtatutes? And as to the idea that the ſtatutes were only cumulative, and in affirmance of the common law, there is not a word in any of them that can ſupport ſuch an opinion. Neither is there any law which makes a diſtinction between conveyances before and after the iſſuing of the writ.

Thoſe votes cannot be ſaid to be affected by the ſtatute of the 7th and 8th of King William, ſince it appears that the number

number of burgages in Downton, has not been increaſed ſince 1458; ſo that there has been no multiplying of voices on the preſent occaſion.

The particular objection to the votes for Legg's and Butt's, Farr's and Dawe's land, and to thoſe of the two Eyres, is that they were not given for ancient diſtinct tenements. But if it ſhould be thought that quarters of burgages carrying a right to vote, could not now be granted out of Legg's and the other farms, will it follow that nothing was granted? The purpoſe was to grant that property which would carry a vote; and, therefore, though miſdeſcribed in the deeds, and called a quarter of a burgage, a whole burgage paſſed. In Rolle's Abridgement, (Title Graunts) (7) it is laid down: "That if one leaſe to another, the meadows in "D and S, containing ten acres, and, in truth the meadows "in D and S, contain twenty acres, ſtill all the twenty "acres ſhall paſs." Each of thoſe farms contain more whole burgages than there are conveyances for them; therefore, there have not been more votes carved out of them than they will bear; for there might be ten, inſtead of ſix votes for Legg's Farm, and ſo, proportionally of the others.—It is ſaid there are no boundaries to diſtinguiſh thoſe different burgages, but if a man grant an acre of land in a field, the whole of which belongs to him, the grantee may take an acre where he will in the field.

As to the votes of the two Eyres, their conveyances are of different premiſes, which have been long two diſtinct dwellings; and there is no proof that there were never two votes given for them.

After having thus endeavoured to anſwer the arguments of the counſel for they petitioners, the proceeded to impeach two of their votes, viz. thoſe of two brothers, John and George Ruſſel.

The amount of the evidence concerning them was, that, before 1713, two perſons, called Roger Plaſket, and John Ruſſel, having married two ſiſters, each of them had a ſeparate houſe, in right of their wives.—When Plaſket died, his houſe came to Ruſſel. He was father to the preſent Ruſſels.—At his death, both houſes deſcended to John, the elder brother; and he, by a deed of the year 1744, made over one of them to his brother George, who has lived at a diſtance

(7) Page 52. No. 24.

tance from Downton, in the Iſle of Wight, ever ſince 1746; ſo that, of late, only one vote has been given for both houſes. In the entries, in the books of the borough, thoſe two houſes are always ſpecified as one tenement, paying ſeven pence rent, ſometimes in the name of John, and ſometimes of John and George Ruſſel. A return was produced of the year 1713, and another of 1726, ſigned by Roger Plaſket, and John Ruſſel; and ſeveral old witneſſes ſwore that the houſes are reputed to carry two votes.

From theſe facts it was contended, that this was but one tenement; that the two names to the indentures of return proved nothing, becauſe returns may be ſigned by perſons as witneſſes, who are not electors or parties to thoſe returns; that, in ſhort, thoſe two votes were liable to the ſame objections with thoſe of the Eyres.

Counſel for the Petitioners in reply.

It is not true that the votes called *faggots* are now objected to for the firſt time, as it appears by the Journals of 3 July 1661 (B), that ſuch votes were objected to, in this borough, at that time. It is not material, in the preſent caſe, to conſider how far the circumſtances of their being made after the iſſuing of the writ and precept, avoided the conveyances and votes made in 1774, as the petitioners will have a majority without them. It is far from being certain that the grantees of 1768 could recover poſſeſſion of the eſtates, the deeds, or the rents and profits, from Mr. Duncombe; but, if they might, ſtill it clearly was never the intent of the parties that they ſhould: the grantees only thinking they acquired, and the grantor only meaning to paſs, a right to vote; and from the intent, the fraud muſt be gathered. Thoſe conveyances come within the definition of *fraud* given on the other ſide, for they purport to do, what in fact they were not meant to do. If it be true that the conveyances are good as between the parties, it does not follow that they are good in ſuch manner as to affect the intereſts of third perſons. Tranſactions that are valid between the parties privy to them, may be fraudulent and void as againſt others. Thus, goods delivered by one perſon to another, may ſtill continue the property of the firſt, as between him and the bailee, and yet the creditors of the bailee may ſeize them in execution; for it is fraud upon third perſons to give a falſe appearance of property which may procure an additional credit, to which the party's real circumſtances would not

entitle him. To ſuffer a recovery in order to bar an entail cannot be a fraud on the donor, for this reaſon, that he muſt be preſumed to know that he granted a defeaſible eſtate.

It is doubtful how far different votes could now be made out of Legg's Farm, or the others, by conveyances of whole burgages, becauſe it is impoſſible to trace the ancient boundaries of the ſeparate burgages of which they are compoſed. It is ſaid, that if one grant an acre of land in a field which belongs entirely to him, the grantee may take any acre in the field, which he chuſes. True; but how ſhall a grantee of a burgage in Legg's Farm, ſeparate his burgage from the reſt? A burgage is not of a known meaſurable extent, like an acre, and there are now no means of aſcertaining what part of the whole farm one burgage makes.

But, however this may be, it never can be holden, that a whole burgage paſſed by thoſe grants. In the caſe of the meadows, cited from Rolle's Abridgment, the whole meadows in D. and S. were leaſed in expreſs terms, and the ſubſequent words merely ſhewed the leſſor's idea of the extent, in which he happened to be miſtaken; but, in the preſent caſe, the only words deſcriptive of the thing conveyed were, "*one quarter of a burgage*," which could never mean a whole burgage. What relief would the grantees pay? Certainly only three pence. What rent? Three pence; and (on alienation) the fine for a quarter, not that for a whole burgage. Nobody can ſay, that, if thoſe grants are good, Mr. Duncombe could not in like manner have carved forty quarters of burgages out of Legg's farm.

The objection to the votes of the two Ruſſels reſts on much weaker ground than that to thoſe of the Eyres. Returns have been produced more than ſixty years back to which the names of the proprietors of both the Ruſſels houſes appear; and it is always to be preſumed, that an indenture of return is ſigned only by voters, for they only are neceſſarily preſent at the election. Beſides, ſtronger evidence cannot be given. The poll-books of borough-elections are rarely printed, or preſerved, and, in this caſe, no polls of thoſe years have been found. Two votes, therefore, have been given for the Ruſſels houſes, for a ſpace of time, equal to what is ſufficient, by law, to ſecure property in lands, againſt any claim whatſoever. In the caſe of the Eyres, the claim of two votes is only an innovation, of a few years ſtanding.

Upon

Upon the whole, if the votes of the Ruſſels ſhould be holden by the Committee to be good, the votes of the petitioners would ſtand as on the poll, viz. eleven and ten,—If they were rejected, nine and eight.

If the objection of fraud and occaſionality ſhould be adopted by the Committee, the petitioners muſt have a great majority. But, although it ſhould not, ſtill, on the other grounds, the votes of the ſitting members muſt be reduced to ſeven, or, if the Eyres votes were allowed, which could not be without allowing thoſe of the Ruſſels likewiſe, to nine. So that in all events, one of the petitioners muſt have a majority of two, and the other of one, over the ſitting members.

The counſel finiſhed on Saturday, the 11th of February.

On Monday, the 15th of February, the Chairman of the Committee reported to the Houſe, that the Committee having met that day, at half an hour after one o'clock, purſuant to their judgment, of the Saturday preceding, and the honourable Booth Grey, one of the members, not attending, they had adjourned till the morning following, twelve o'clock. At the ſame time he informed the Houſe, that he had that day received a letter from Mr. Grey, which being delivered in at the table, and evidence been given to the Houſe that it was of the hand-writing of Mr. Grey, and the letter being read, and the Chairman of the Committee informing the Houſe, that the evidence and arguments of counſel on both ſides were finiſhed, but that the Committee had not yet come to any determination; it was ordered, that Mr. Grey ſhould be diſcharged from farther attendance on the Committee, and that the Committee ſhould proceed on the morning following, according to their adjournment, notwithſtanding Mr. Grey's abſence. Then, on the information of a member that Mr. Grey was in the country at too great a diſtance for an order to reach him in time for his attendance the next day, an order was made for his attendance in his place on Friday (8). However, the next day, (Tueſday the 14th of February) Mr. Grey being returned, and having, in his place, informed the Houſe, that he was very ſorry that his abſenting himſelf from the Committee, had given the Houſe any trouble, but that the buſineſs, on which he was obliged to go into the country, was urgent,

(8) Votes, p. 209, 210.

and indiſpenſable, the order for his attendance on Friday was diſcharged (9).

On Tueſday, the 14th of February, the Chairman informed the Houſe that the Committee had determined,

"That Thomas Duncombe, Eſq; is not duly elected a "burgeſs, to ſerve in this preſent Parliament, for the bo- "rough of Downton, in the county of Wilts:

"That Thomas Dummer, Eſq; is not duly elected a "burgeſs, to ſerve in this preſent Parliament, for the bo- "rough of Downton, in the county of Wilts:

"That Sir Philip Hales, Baronet, the petitioner, ought "to have been returned a burgeſs, to ſerve in this preſent "Parliament, for the borough of Downton, in the county "of Wilts:

"That the ſaid Sir Philip Hales, Baronet, is duly elected "a burgeſs, to ſerve in this preſent Parliament, for the "ſaid borough of Downton:

"That John Cooper, Eſq; the petitioner, ought to have "been returned a burgeſs, to ſerve in this preſent Parlia- "ment, for the borough of Downton, in the county of "Wilts:

"That the ſaid John Cooper, Eſq; is duly elected a "burgeſs, to ſerve in this preſent Parliament, for the ſaid "borough of Downton."

Theſe determinations were ordered to be entered in the Journals, and the return to be amended the day following (1), which was accordingly done (2).

(9) Votes, p. 218.
(1) Votes, p. 216.
(2) Votes, p. 223.

NOTES

NOTES

ON THE CASE OF

DOWNTON.

PAGE 107. (A). Neither the Durham caſe in 1762, nor the caſes of Plympton and Ipſwich, which were then cited, are exactly in point, as to occaſionality at common law.

In the latter, the objection was not occaſionality, but that freemen had not been made according to the conſtitution of the place, 1 April, 1714. 1714. Journ. vol xvii. p. 528. col. 2.

In the caſe of Plympton, 28 Jan. 1702-3. It having appeared by the report of the Committee, that ſeveral honorary freemen had been elected by the magiſtrates, immediately preceding the election of the members of Parliament, and that the right of the magiſtrates to elect ſuch honorary freemen not having a previous title was diſputed, the Houſe reſolved, " That " the proceeding of the mayor and corporation of the borough " of Plympton, in the county of Devon, in making freemen, " after the death of his late majeſty, to vote at the laſt election, " was illegal, and contrary to the rights of the ſaid corpora- " tion; and that thoſe freemen then *pretended* to be made, " have not thereby obtained any right to vote, upon that ac- " count, in any future elections." Journ. vol. xiv. p. 151. col. 1.

Although, from the mention of the death of the late king, as the period from which the bad votes were to be dated, it would ſeem that the Houſe had occaſionality in their view, yet we muſt ſuppoſe that, when they declared the freemen made after that time to be only *pretended* freemen, and who had not acquired a right to vote at any ſubſequent election, they muſt have conſidered them as illegally admitted to their freedom.

In the caſe of Durham, 215 freemen were made juſt before the election, and 93 of thoſe, were ſworn in, on, or after, the day of the teſte. But, beſides that circumſtance, they were objected to as being made contrary to the conſtitution of the city. The Houſe reſolved, 11 May, 1762, " That the 215 perſons " made, or *pretended* to be made, free of the city of Durham, " ſince the death of Henry Lambton, Eſq. late member of Par- " liament for the ſaid city, had not a right to vote in the late " election

" election of a citizen to ſerve in Parliament for the ſaid " city." Journ. vol. xxix. p. 382. col. 1, 2. p. 337. col. 2.

P. 113. (B) The entry in the Journals of the 3d of July, 1661, is this,

" Serjeant Charleton reports, from the Committee of privi- " leges, and elections, touching the election for the borough " of Downton, that the queſtion was, whether the out-livers " that have freeholds, but no houſes, within the borough, had " voices, and the opinion of the Committee that they had " voices; and that Mr. Elliot, and Mr. Eyre had the major " voices; and were duly elected, and ought to ſit. But ſome " members inſiſting, that divers inconſiderable freeholders were " fraudulently created; whereby the ſaid Mr. Elliot and Mr. " Eyre obtained the majority of voices; concerning which " ſome of the evidence was not heard;——The queſtion was " put, That this Houſe doth agree with the Committee: " Whereupon the Houſe was divided——Noes 109, Yeas 108; " ſo it paſſed in the negative. Ordered, that the ſame be re- " committed to the ſaid Committee, fully to examine the ſaid " point of fraud." Journ. vol. viii. p. 288. col. 2.

But nothing further appears on the Journals, concerning this matter.

V. THE

VI.

THE

CASE

Of the CITY and COUNTY of the

CITY of BRISTOL.

The Committee was chosen on Friday, the 10th of February, and consisted of the following Gentlemen.

Right Hon. George Rice, Chairman,	Members for	Carmarthenshire
Sir Richard Worsley, Bart.		Newport Hants
Nathaniel Polhill, Esq.		Southwark
Sir Harbord Harbord, Bart.		Norwich
Sir Thomas Miller, Bart.		Lewes
Hon. Charles Finch,		Castle-Rising
Hon. Simon Fraser,		Inverness-shire
Henry Herbert, Esq.		Wilton
Walter Waring, Esq.		Coventry
John Buller, Esq.		Launceston
Richard Milles, Esq.		Canterbury
Thomas Knight, Esq.		Kent
Charles Penruddocke, Esq.		Wiltshire
NOMINEES.		
Sir Edward Astley, Bart.		Norfolk
Edward Bacon, Esq.		Norwich

PETITIONERS.

Matthew Brickdale, Esq.

Certain Freeholders and free Burgesses of the City and County of the City of Bristol.

Sitting Members.

Henry Cruger, the younger, Esq. Edmund Burke, Esq.

Counsel for the Petitioners.

Mr. Mansfield. Mr. Hobhouse.

For Mr. Cruger.

Mr. Bearcroft, Mr. Buller.

For Mr. Burke.

Mr. Lee. Mr. Wilson.

THE

THE CASE

Of the CITY and COUNTY of the CITY of BRISTOL.

ON Saturday, the 11th of February, the Committee being met, the two petitions were read, ſetting forth; That the election was holden on the 7th of October, and that, *at the election*, the petitioner Mr. Brickdale, together with Robert Craggs Lord Viſcount Clare of the Kingdom of Ireland, and Henry Cruger the younger, Eſq; and no other perſons, were candidates; that a poll was *then* demanded for each of the three candidates, proceeded upon, and adjourned to the following day; that, on the ſucceeding day, (the 8th of October) Lord Clare declined proceeding on the poll; and that Mr. Brickdale the petitioner, having on that day a majority of votes, ought to have been declared duly elected, and to have been returned; but, that Edmund Burke, Eſq; was, on the ſame day, (the 8th of October) firſt named a candidate; that the ſheriffs, afterwards, on the 10th of October, and not before, unjuſtly and illegally awarded a poll to be taken for Mr. Burke, notwithſtanding the proteſtation of Mr. Brickdale, and many of the electors, to the contrary.

That, in order to influence the election, great numbers of perſons were admitted to the freedom of the city, after the date, and iſſuing forth of the writ; and that they were illegally admitted, by the ſheriffs, to poll for Mr. Burke, and Mr. Cruger, contrary to the ancient uſages and cuſtoms of the city.

That divers perſons, not legally admitted to their freedom, nor having any right to vote, were admitted to poll for Mr. Burke and Mr. Cruger.

That Mr. Burke, and Mr. Cruger, by themſelves, and their agents, and others, by their privity, and direction, before and during the poll, were guilty of bribery.

And

And that by all thoſe means, Mr. Burke, and Mr. Cruger obtained a pretended majority, and were returned; whereas Mr. Brickdale was duly elected, and ought to have been returned.

From the allegations juſt ſtated, it appears that there were ſeveral queſtions in this caſe.

I. Whether a perſon may be elected, who becomes a candidate on a day ſubſequent to that on which the election was appointed to be holden, and on which the poll commenced?

II. Whether perſons admitted to the freedom of the city of Briſtol, after the date and iſſuing of the writ for an election of members of Parliament for that city, have a right to vote at ſuch election?

☞ There is a general allegation, reſpecting illegal freemen, and voters; but, on the trial of the caſe, no other objection was gone upon, but that to the votes of freemen made after the teſte of the writ.

III. Whether Mr. Burke, and Mr. Cruger, or either of them, were guilty of bribery?

At the requeſt of the counſel for the petitioners, and for Mr. Cruger, the Committee reſolved to proceed upon, and determine, the firſt queſtion, before they ſhould go into the reſt of the caſe.

The facts on this head were as alleged in the petitions. One of the ſheriffs proved, that when Mr. Burke was nominated, on the ſecond day of the poll, which was Saturday, they continued the poll till Brickdale and Cruger had a majority over Lord Clare, and then adjourned it till the Monday following, in order to take the opinion of the recorder of Briſtol; and that his opinion was in favour of Burke's admiſſibility to be a candidate.

The arguments for the petitioners were, in ſubſtance, as follow:

The election is, in the eye of the law, completed on the firſt day. The ſound of voices, or the ſhew of hands on the view, is, in truth, the election; and the poll, if it be demanded, is only a method of aſcertaining who has already been elected by the majority of voices.

No writ, or ſtatute, warrants the opinion that the poll is the election. On the contrary, by the ſtatute of the 7th of Henry the fourth, cap. 15. it is enacted, "That on the "day appointed by that act, all they *that be there preſent*, "ſhall

" ſhall attend to, and proceed to the election;" and, in like manner, the writ directs, " That the election ſhall be " made by *thoſe preſent* at the proclamation (1)." Is it not therefore evident, that both the ſtatute, and the writ, underſtand the election to be made on the day when the proclamation is made? And if ſo, a candidate, who appears after that day comes too late, and can no more be choſen, than if he were to come after the poll is cloſed, and the return executed.

Whitelock (2) in commenting on theſe words of the writ, " *Thoſe who ſhall be preſent at ſuch election*," ſays, " That, " though practice warrants the admitting voters to give " their voice on the poll, who were not preſent at the pro- " clamation for the election, the words of the ſtatute, and " of the writ, ſeem to be againſt it." But there is no practice, no precedent, to warrant the admiſſion of a candidate after the firſt day, and the words both of the ſtatute and writ have been ſhown to be againſt ſuch admiſſion. Sir Edward Coke conſiders the poll, not as the election, but as a mere numeration of the votes which had been given at the election, in order to diſcover, with certainty, which of the candidates had the majority. He therefore makes no diſtinction between a poll and a ſcrutiny. His words are (3), " For " the election of knights, if the party, or the freeholders, " demand the *poll*, the ſheriff cannot deny the *ſcrutiny*, for " he cannot diſcern who be freeholders by the view; and, " though the party would wave the poll, yet the ſheriff " muſt proceed in the ſcrutiny." In the caſe of an action of debt on a falſe return, reported in Plowden's Commentaries, all the judges ſeemed to have treated the poll as diſtinct from the election (4).

Many inconveniencies would attend the admiſſion of candidates at any advanced ſtage of the poll. For inſtance: ſuppoſe there are three candidates nominated at the beginning of an election, and certain electors give only ſingle votes for one of the candidates, not being anxious which of the

(1) The words of the writ to the ſheriff of a county *corporate* are, in this reſpect, the ſame with thoſe of the writ to the ſheriff of a common county; for which ſee *infra*, Caſe of Abingdon, note (A).

(2) Parl. Writ. vol. ii. p. 25.

(3) 4 Inſtit. p. 48.

(4) Plowden's Comm. p. 118. & *infra*.

the other two ſhall be their ſecond member; if, a day or two afterwards, a new candidate could be received, though thoſe electors might prefer either of the other two to him; and though they may be ſo numerous, that if they had known of him, when they gave their voices ſingly, they might, by giving ſecond votes to one of the other two, have effectually excluded him; yet, as they cannot vote again, this new comer may be choſen and returned, contrary to the ſenſe and inclinations of the majority of the voters (5).

On the part of Mr. Burke, it was argued;

That in order to be elected it cannot be neceſſary for a man to be nominated, or to declare himſelf a candidate, that being a term of no determined ſignification in law.

In a caſe determined in the court of King's Bench, Lord Mansfield ſaid, "*Candidate*" is a vague term. No certain "idea is fixed by law to it; ſurely aſking a vote for a man "is enough to make him a candidate (6)."

So far from its being neceſſary to become a candidate, a man may be choſen and returned without his conſent, and againſt his will. This is proved by the caſe of the county of Glouceſter, reported by Glanville (7); for there the Committee, and the Houſe, determined, (9 April, 1624) that Sir Thomas Eſtcourt, having had a majority of votes on the poll, was duly elected, and returned, although he had declared at the election, that he deſired not to be choſen (8) (A).

If, to be choſen, neither the declaration nor the aſſent of the party is neceſſary, it muſt follow that the voices may be given for any man lawfully qualified to be elected, at any time before the end of the poll. That voters, not preſent at the nomination, nor on the firſt day, may ſtill give their voices, was admitted by the counſel on the other ſide, and is proved to be unqueſtionable by the conſtant practice, as well as by the determinations in the caſe of Glouceſter juſt cited, and in that of Arundel in the ſame author (9). Can it then be contended, that ſuch perſons have ſtill a right to vote, but that, whereas thoſe who were preſent the firſt day, and at the commencement of the poll, might have voted for any

(5) See *infra*, note (B).
(6) Combe *v.* Pitt, 3 Burr. p. 1590. (7) P. 99.
(8) Journ. vol. i. p. 795. col. 1.
(9) Glanv. p. 71. Journ. vol. i. p. 748. col. 1. 24 March 1623-4.

any man in the kingdom qualified to ſit in Parliament, and each for a different perſon, they, on the contrary, muſt vote for one or other of two or three people, propoſed on that day, or elſe not at all?

Where the law ſeems to conſider the election as happening on the firſt day, it is only by relation, and legal fiction; as the term in Weſtminſter-hall, and the whole ſeſſion of Parliament, are conſidered as one day. The ſtatute of the 7th. of Henry the fourth was made againſt the partiality of ſheriffs, who uſed to ſummon only whom they pleaſed, and to admit the votes only of thoſe ſo ſummoned. It therefore enacted, that not merely a partial number of electors, as formerly, but that all preſent ſhould vote at the election. Shall a ſtatute whoſe object was to extend, be ſo conſtrued as to narrow the right of election?

There can be nothing inferred from what has been cited from Whitelock. In another part of the ſame work, it is plain that he underſtands the words "*thoſe preſent*" to be uſed in contradiſtinction to, and to the excluſion of, votes by proxy. "Elections," ſays he, "cannot be made but by the "*perſonal preſence* of the electors, yet ſuffrages, in councils, "are ſometimes admitted to be by proxies." There is great inaccuracy in the paſſage of Lord Coke's fourth Inſtitute, which has been relied on. He there confounds the *poll* with the *ſcrutiny*, although they are two very diſtinct things. In every place the returning officer muſt grant a poll, if demanded, but it is at his diſcretion to grant a ſcrutiny, unleſs in the particular caſe of the city of London, where, by ſtatute (2), it muſt be granted, if demanded. Nothing in Plowden's Report of the caſe quoted by the counſel for the petitioners, will ſupport their doctrine; but if any thing there ſhould be thought to favour it, little ſtreſs will be laid on what is put in the mouths of the judges, relating to the law of Parliament, in a caſe where one of them is made to ſay, "That the Houſe of Commons never determines any queſtion by poll (3)," when in truth, every queſtion, on which there is a diviſion of the Houſe, is ſo determined.

But the Statute-book will beſt ſhow the ſenſe of the legiſlature on this ſubject. From a review of the acts of Parliament concerning elections, it will be ſeen, that the *election* and

(2) 11 Geo. I. cap. 18. §. 4.
(3) Plowd. Com. *loc. cit.* p. 126.

and the *poll* are uſed in thoſe acts interchangeably, as ſynonimous expreſſions. Thus by the 7th and 8th of William III. cap. 25. ſect. 3. and 5. it is enacted, "That in caſe the election ſhall not be determined upon the view, but a poll ſhall be required, the ſheriff ſhall forthwith proceed to take the *poll*, and ſhall not, by any unneceſſary adjournment, protract the *election*, but ſhall duly proceed, from day to day." By the 10th of Anne, cap. 23. ſect. 5. "The ſheriff, or returning officer muſt *within* 20 *days* after the *election* deliver over, upon oath, to the clerk of the peace, all the poll-books of ſuch election, without any alteration." Does *election* there mean only what paſſes on the firſt day, or before the beginning of the poll? Impoſſible. In counties where the number of freeholders is ſometimes very great, elections frequently laſt ſeveral weeks, and the legiſlature could never intend to enact, that the poll-books ſhould be delivered up before the poll was concluded. By the freeholder's oath, 18th of George II. cap. 18. every freeholder is to ſwear, "That he has not been *polled* before at that *election*." If the *poll* is not the *election*, but merely a ſcrutiny, a man might ſafely vote every day, notwithſtanding his having taken the oath. Indeed he could not be *polled* at the *election*, and the words of the oath would be unintelligible.

If there were no caſes in point to be found, *that* would only prove that the objection now made to the election of Mr. Burke, had never been thought of before. But there are caſes in favour of Mr. Burke. It appears by the Arundel caſe, reported by Glanville, that the two members may be choſen at different times, one firſt, without any nomination of the other, and afterwards a poll be taken for the other, between two new candidates; and the Houſe reſolved in that caſe, that at this choice of the ſecond member, the electors might have voted for either of the two declared candidates, "or for any other (4)." In the caſe of Montgomery, 17th January, 1705-6, one of the points for Vaughan the petitioner was, that there had been a *ſurprize* in Maſon the ſitting member's appearing as a candidate. It was proved that it was not known that Mr. Maſon intended to ſtand candidate, nor that he had appeared in the town, until they had actually begun the election; then one Mr. Powell demanded

(4) Glanv. p. 74.

manded a poll for Mr. Maſon, and Mr. Maſon himſelf appeared as a candidate; and, upon a poll, there were for Mr. Maſon 41; for Vaughan 30. The houſe reſolved, that Maſon was duly elected (5). If a candidate can appear after the beginning of the poll, when what is contended to be the election is over, though on the ſame day, one may as well appear on any ſubſequent day, while the poll continues, that is, in the words of Glanville (6). "While the election "is ſtill in hand, and unfiniſhed;" for no reaſon can be given why a perſon appearing on the firſt day, but after the commencement of the poll, ſhall be ſtill eligible, and one who appears on any future day of the poll, ſhall not; and, in the caſe of Beeralſton, 28th April, 1640, the Houſe held the election of a Mr. Harris good, although eleven days had intervened between that, and the election of the other member; the other having been choſen on the 16th of March, and Mr. Harris not till the 27th, and not having appeared as a candidate on the 17th (7). (B).

Arguments *ab inconvenienti* are, and ought to be of weight, in guiding us to the true interpretation of the law where it is doubtful, ſince it ſhould not be ſo conſtrued as to lead to abſurdity, or injuſtice. But the inconvenience ſuggeſted by the counſel on the other ſide is, in fact, none; for why ſhould not the voters in the caſe put, exerciſe their franchiſe completely at firſt? They may give their ſecond vote for whomſoever they pleaſe; and if they do not, they will only have themſelves to blame, and they will loſe one of their votes, in the ſame manner as they would both, if they ſhould not attend the election at all.

But a real inconvenience, and a very ſerious one, would ariſe, if the law ſtood as the counſel for the petitioners contend. Suppoſe, in the caſe of only three candidates nominated at the beginning, A, B, and C, the third, C, to be obnoxious to the majority of the electors, and therefore to have no chance againſt the other two; and ſuppoſe a corrupt agreement between him and the firſt A, that, after the firſt day of the poll, A ſhall decline; then the electors who have not yet polled muſt perſiſt in voting for the perſon who has thus abandoned them, or they muſt either not vote for a ſecond

(5) Journ. vol. xv. p. 94, 95.
(6) *Loc. cit.*
(7) Journ. vol. ii. p. 14. col. 2.

ſecond member at all, or elſe give their voices to the party on whoſe account the firſt had declined; and he muſt, if he have a ſingle voice, be returned as duly elected, even if he were the perſon in the world whom the major part of the voters would leaſt wiſh to have for their repreſentative.

After deliberation, the Committee, by their Chairman, informed the counſel that they were of opinion:

That Mr. Burke, was eligible.

After this deciſion, the Committee deſired, that the counſel for the petitioners would ſpeak firſt, and ſeparately, to the charge of bribery; becauſe if that were proved, it would put an end to the cauſe. But they declined that mode; and having moved that the queſtion concerning the right of election ſhould be ſeperately argued, and determined; alledging, that ſuch had been the uſual practice, before the old judicature, where there was no determination of the Houſe, and the right was diſputed; the counſel on the other ſide objected to this; and the Committee reſolved,

"That the counſel for the petitioners ſhould proceed to "open the whole that remained of their caſe."

There is no determination of the Houſe, of the right of election in Briſtol, but it ſeemed to be taken for granted on both ſides, that it is "In the freeholders having "freeholds "of forty ſhillings a year, and the free burgeſſes."

The numbers on the poll, as produced by one of the returning officers, were,

For Cruger	3565
For Burke	2707
For Brickdale	2456
For Lord Clare	283

It was admitted on both ſides, that, if the votes of thoſe perſons, who were admitted to their freedom after the teſte of the writ ought to be ſtruck off, Mr. Brickdale would have a clear majority over Mr. Burke, and *vice verſa*.

The counſel for the petitioners contended; That, by cuſtom, and the ancient uſage of Briſtol, ſuch perſons have no right to vote; and that ſuch a cuſtom is legal, reaſonable, and convenient; and they argued, that independent of ſuch a local cuſtom, the votes of freemen, admitted after the teſte of the writ, are bad upon general principles.

To prove the cuſtom they produced the following evidence: Sir Jarrit Smith, formerly an attorney, ſaid, That he remembered all the elections for Briſtol ſince 1712, and had

had taken an active part in many; That he took no concern in the elections of 1712, and 1714-5; but that he was a manager at the conteſted election of 1722; That, on that occaſion, no freemen were ſuffered to vote, who had been admitted after the teſte of the writ; That they were ſo exact, that, if they met with any raſure in the copy of admiſſion tendered by a voter, they ſent for the corporation-book to aſcertain the true date; That ſeveral admiſſions appearing to bear date on the day of the teſte, cavils aroſe about *them*, and to ſave time, it was *agreed*, that the votes of thoſe freemen ſhould be taken; That at the next election, of 1727, which was alſo conteſted, and where he was a manager, the votes of perſons made free after the teſte, were rejected without controverſy or diſpute; That the ſame rule was followed in 1734, 1739, and 1754, when the elections were conteſted, and he was a manager, and in 1756, when he was a candidate, and there was a very warm conteſt; That there has been no conteſt ſince that year, till the laſt election; That, from a knowledge of the cuſtom, perſons entitled to be made freemen have uſually preſſed in at the chamberlain's office, to get admitted before the teſte, that office being generally opened at ſtated hours for that purpoſe; That he did not recollect that there was any *agreement* of the candidates, that freemen made after the teſte ſhould not vote; That he thought the cuſtom immemorial; That, when he was a candidate, he had entered into no ſuch agreement: That at the laſt election, he had polled for Mr. Brickdale, but had not aſked a ſingle vote for him, not even that of his own ſon.

On his croſs examination, a brief of his, which was proved to have corrections on it, in his own hand writing was produced, being deſigned for the Houſe of Commons, on occaſion of the election of 1734, when Mr. Coſter, one of the candidates who were returned, was petitioned againſt by Mr. Scrope, the recorder of Briſtol, who had alſo been a candidate. In this brief, the right of election was ſtated to be, "In freeholders of forty ſhillings a year, and *in all* "*freemen*, reſident or non reſident, except ſuch as lived in "*alms houſes*" an *agreement* was ſtated to have been made, between the contending parties, "That, to prevent diſputes, "freemen admitted after the teſte ſhould not be polled," and the witneſs's name ſtood on the brief, as the perſon who was to be called to prove this ageement. (☞ The cauſe

cauſe never came to be tried, the petitions having been withdrawn) (8).

William Hart, Eſq; ſaid, That he was upwards of ſeventy; That he remembered his father's being a candidate for Briſtol, in 1722; That it was then received as a general rule, that no freeman, admitted after the teſte, ſhould poll, and that none did poll; That, in 1727, they did not, for this reaſon, attempt to have any admitted after the teſte; That ſuch freemen did not vote in 1734; That he was a manager in all thoſe elections; That, in 1739, the ſame rule was ſtill obſerved; That, on that occaſion, he attended at the office to get freemen admitted, and left off as ſoon as the teſte of the writ was known; That he believed the managers on the other ſide, did ſo likewiſe; That he believed, that in 1756 ſome were polled who had been admitted to their freedom on the day of the teſte.

On his croſs examination, he ſaid; That he remembered the caſe of Coſter and Scrope, in 1734; That Scrope attempted to confine the right of election "To the freeholders "of forty ſhillings a year, and the freemen *reſident within the borough*, paying ſcot and lot;" That, in 1772, and in 1727, he did not know of there being any diſpute about the votes of freemen admitted after the teſte; That he muſt have heard of it if there had been any; That the firſt time he heard the ſubject talked of, was in 1734; That, in 1754, and 1756, he thought no ſuch votes were offered; That he did not know there was any bye-law to this purpoſe.

Thomas Harris, Eſq; ſaid; That he was one of the returning officers, in 1754; That he and his colleague, determined to refuſe the votes of freemen admitted after the teſte, conceiving that ſuch was the ancient eſtabliſhed uſage; That neither of the candidates objected to the rule, and that it was obſerved throughout; That it was ſettled by the *agreement* of the ſheriffs and candidates, that perſons admitted to their freedom on the day of the teſte ſhould be allowed to vote.

Rowles Scudamore, Eſq; Barriſter, ſaid; That he was ſteward of the ſheriff's-court, in 1754, and in 1756; That there was, in 1754, an altercation about the votes of perſons admitted to their freedom upon the day of the teſte, which was ſettled by the parties agreeing that ſuch perſons

(8) 22 April, 1735. Journ. vol. xxii. p. 472. col. 2.

ſhould vote; That the ſame agreement was made in 1756, but that it was generally underſtood, on both occaſions, that none made free after the day of the teſte could vote, and that there was no diſpute on that ſubject.

It appeared, by the corporation-books, that many perſons had been admitted to their freedom, ſubſequent to the teſte of ſeveral writs where the elections were conteſted; and, on the examination of the poll-books of thoſe elections, none of them were found to have voted.

At the laſt election, the firſt vote of this ſort which was tendered, was objected to, and they were all entered on the poll with a Quere.

Such being the evidence brought in ſupport of the cuſtom, it was ſaid; That it had been eſtabliſhed by the teſtimony of perſons beſt able to know the truth on the ſubject; men who had acted, at a variety of conteſted elections, in the characters of agents, candidates, or returning officers.

The brief, which has been produced can prove nothing, for no inference can be drawn from what a ſolicitor ſtates in a brief, in favour of his client. If the cuſtom is proved, it is a lawful and reaſonable cuſtom. This the Houſe has recognized in the caſe of Norwich, by confirming a ſimilar uſage there.

12 March 1701-2, Reſolved, "That ſuch perſons, as "had a right to their freedom in the city of Norwich "before the teſte of the writ, and took out their freedom "after the ſaid teſte, not having demanded the ſame be-"fore the ſaid teſte, had not a right to vote in the laſt "election of citizens to ſerve in this preſent Parliament "for the ſaid city (9)."

Independent of the uſage, votes of freemen made after the teſte of the writ, are bad on general principles; for the writ muſt be ſuppoſed to ſpeak of electors, qualified to be ſo at the time when it iſſues, not of perſons who become ſo afterwards (1). Votes too of perſons who take up their freedom, on the eve of an election, merely on purpoſe to vote, (as was done by thoſe now objected to, being moſt of them men entirely unconnected with Briſtol, and who never before had thought of claiming to be made free of that place,) are bad on the general ground of fraud and occaſionality (2).

On

(9) Journ. vol. xiii. p. 791, col. 2.
(1) Vide *ſupra*, Caſe of Downton, p. 108.
(2) *Ibid.* Note (A). p. 117.

On the head of bribery the facts came out to be; That a Committee of gentlemen who were in the interests of Mr. Burke and Mr. Cruger, had paid the fees of admission for the new freemen, with money raised by subscription for that purpose; but that neither of the candidates had subscribed, or paid any of that money, and that no promise had been desired of the freemen so admitted, to vote for any one, as the condition of their fees being paid.

The counsel for the sitting members called Doctor Britton, aged sixty-three, to give evidence on the question concerning the right of persons admitted after the teste of the writ. What he said did not materially vary from what has been stated.

They argued, that the custom contended for, had not been proved.

If such an usage has always prevailed, it must appear by the books of the corporation, and other written documents; it must be known to a great number of witnesses; every alderman, every member of the corporation of Bristol, must know it; yet none of *them* have been produced to prove it.

The brief of Sir Jarrit Smith proves, that, in 1734, the contending parties *agreed*, "That persons made free "after the teste of the writ, should not vote." To what purpose this *agreement*, if there was a clear established *custom* against them? Does not the agreement demonstrate that the custom did not exist? What appears upon that brief is not like the common contents of a brief drawn up by a *Sollicitor* in behalf of his client. Sir Jarrit Smith is there stated as a *witness*, who was to prove the *agreement* to exclude those who were admitted after the teste; and it was revised by himself, and corrected with his own hand.

If the usage originated from the agreement of parties, it must fall to the ground; for it is an established maxim, that no consent of parties can alter the right of election. This was determined by the House in the case of Cirencester, 21 May, 1724.

Even if the custom had been proved, it would require strong precedents to support such a custom against men having an antecedent inchoate right to their freedom. In the Norwich case, which had been relied on, only thirty-six votes were objected to, and rejected in con-

ſequence of the reſolution of 1701. Can we believe that, in ſo populous a city as Norwich, when there was a conteſted election, only that ſmall number of perſons entitled to their freedom *by birth or other antecedent rights*, ſhould demand to be admitted? Ought we not rather to conclude, that the thirty-ſix were *honorary* freemen, who had been *elected* before, and were admitted after, the teſte? Beſides, the reſolution does not lay down a general rule even for that place, but only declares that the votes of freemen who had been ſo admitted on that particular occaſion, were bad.

But the cuſtom in this caſe not being proved, the votes in queſtion cannot be impeached on any other ground.

There is no law to make the teſte of the writ the line, beyond which perſons, having an inchoate right to vote, cannot complete it, ſo as to exerciſe their franchiſe at that election. In ſeveral caſes, the Houſe has allowed the votes of perſons, having an antecedent right to their freedom, although never admitted. In the caſe of Guildford, 3 Feb. 1710-11, it was admitted before the Committee of elections, "That one who has ſerved a "ſeven years apprenticeſhip in the town to a freeman, "is, *ipſo facto*, a freeman (4)." And in that of Sudbury, 19 Jan. 1702-3, it was reſolved by the Houſe, "That perſons having certain inchoate rights to freedom (deſcribed in the reſolution) have a right to vote, without any admiſſion (5)."—In Newcaſtle, the conſtant practice is to hold a guild, after the proclamation, in order to admit freemen who have an antecedent title; and this was never objected to.—At the laſt election for the county of Monmouth, a perſon who had voted having died, pending the poll, his ſon voted for his land, and his vote was holden to be good.

Great inconvenience would follow, if the teſte of the writ were to be fixed as the period, beyond which no freeman can be admitted. It might be the means of improper influence and partiality; for, on an intended diſſolution, a candidate, who happened to be in the good graces of thoſe whoſe ſituation makes them acquainted with ſuch

(4) Journ. vol. xvi. p. 477, col. 1.

(5) Journ. vol. xiv. p. 190. col. 2. p. 191. col. 1. See the reſolution ſtated at large in the caſe of Sudbury. *infra.*

ſuch a deſign, might be appriſed, in time to have as many of his friends admitted as would out-number thoſe of an antagoniſt who had not the means of ſuch uſeful intelligence.

As to occaſionality; It is clear from the Durham act (6), that this objection cannot lie againſt men poſſeſſed of an antecedent title, for *they* are excepted out of the reſtriction of that ſtatute. The exception with regard to Norwich and London, in the Durham act, only corroborates the inference drawn from that act. There is a particular ſtatute for regulating elections (7) in the city of Norwich, by which *every* perſon before he can poll at an election of members of Parliament, muſt ſwear, "that "he has been *admitted* a freeman of that city for twelve "calendar months." It is therefore provided, that the Durham act ſhall not extend to Norwich, leſt otherwiſe, the exception with regard to perſons having an antecedent right to their freedom, ſhould have been thought to repeal *as to them* the proviſion juſt ſtated from the ſtatute relating to that place. The ſame reaſoning will apply to the exception of London, becauſe, by the ſtatute for regulating elections in that city, *no perſon* can vote for members of Parliament there, who has not been actually on the livery twelve calendar months (8).

Indeed it would be abſurd to object occaſionality to perſons entitled to their freedom, by birth, marriage, or ſervitude, ſince nobody ever entered into the relations of ſon, huſband, or apprentice, for the purpoſe of acquiring a vote. Such perſons are to be conſidered as having purchaſed their right; and it would be unjuſt to prevent their perfecting and exerciſing it, at any time when they pleaſe. Occaſionality can really be objected only to honorary freemen, who have never had any connection with the borough, and might be brought in, in ſuch numbers as to deprive the fair freemen of all the benefit of their franchiſe.

As to the charge of bribery; It has been proved that there was not a farthing paid by the ſitting members for the admiſſion fees. If candidates, or their agents, or, perhaps,

(6) 3 Geo. III. cap. 15.
(7) 3 Geo. II. cap. 8.
(8) 11 Geo. I. cap. 18. §. 14.

haps, even their partizans, were to pay for the admiſſion of freemen with a conditional ſtipulation for their votes, *that* would be corruption, and would affect both the electors and the elected. But, if even a candidate were to pay for ſuch admiſſion without any ſtipulation, *this* would be entirely innocent; as much ſo, as when one defends the rights of his conſtituents on petitions in the Houſe of Commons, or *Quo Warrantos* in the courts of law.

In reply, the counſel, on the part of the petitioners, inſiſted;

That the cuſtom had been proved.

It is a ſtrange objection that ſo few witneſſes have been called to eſtabliſh the cuſtom, when, on the other ſide, they have called none to contradict it. It is ſaid, that the members of the corporation of Briſtol have not been produced to prove it. Why have they not been called to diſprove it? This is not a cuſtom of ſuch a general ſort as to be commonly talked of. It could only come in queſtion at the time of a conteſted election, and, as was ſaid before, the witneſſes who have appeared to prove it, are men who, by being actively concerned on ſuch occaſions, were moſt likely to be acquainted with it. It is not the practice any where to enter the right of election in the corporation-books: if it were, that right would ſoon come to be veſted ſolely in thoſe who have the care of, and power over, thoſe books.

The *agreements*, at ſeveral elections, that perſons admitted *on* the day of the teſte ſhould be allowed to vote, is the ſtrongeſt evidence that thoſe admitted *after* could not vote. If *theſe* could have voted, the right of *thoſe* could never have been a queſtion. It is contended, that thoſe admitted after the teſte were excluded merely by the *agreement* of the parties; but can it ever be believed that the perſons ſuppoſed to have been the objects of ſuch agreement, would have ſubmitted to have been ſo deprived of their right? Can it be imagined that both the candidates could have ſuch an equal number of partizans under this deſcription, as that neither ſhould find it his intereſt to refuſe concurring in ſuch an agreement? This inference has been drawn from what is ſtated in the brief with regard to the evidence to have been given by Sir Jarrit Smith. But what was he to prove? That the parties had agreed that freemen who had been admitted

after

after the teſte, or who *lived in alms-houſes*, ſhould not be polled (9). Alms-men are no where entitled to vote (1); the agreement applies equally to *them*. It therefore only can mean that the parties agreed, "that ſuch perſons had "no *right* to vote."

The teſte of the writ is a period from which both the legiſlature and the Houſe draw a line in many caſes, as in the treating act of the 7th and 8th of King William, &c. the Caſe of Norwich, &c. (C).

There is nothing in the Norwich caſe to warrant the conſtruction put upon the reſolution of the Houſe in that caſe; for the freemen excluded from voting by the reſolution, are expreſsly deſcribed "as perſons having *a right* "before the teſte;" and, if this meant any right more particularly than another, it is more likely to mean ſuch a right as often exiſts for a long ſpace of time before it is perfected by admiſſion, ſuch as the right acquired by birth, ſervitude, or marriage, than one gained by election, which is generally followed immediately by admiſſion. The inſtances of Guildford, and Sudbury, only prove particular cuſtoms, in thoſe two places. As to the pretended inconvenience that might happen, the very attempt of ſuch a ſurprize would prevent it, for a great number of perſons could not be brought together to be admitted to their freedom, by one candidate, without his antagoniſt's being appriſed of it, and enabled to act accordingly.

The Durham act has left the occaſionality of voters having inchoate rights juſt as it found it. That ſtatute appears by the preamble, to be aimed ſolely at occaſional *honorary* freemen; and, if it has not extended the reſtriction of a year to the others, neither has it ſaid, that their votes can, in no caſe, be occaſional. Though ſuch perſons do not *gain* their antecedent titles, for any occaſional purpoſe of voting, they may, and often do, *complete* thoſe titles, for ſuch occaſional purpoſe. Where they do, their votes ought to be rejected on that particular occaſion, though they will be valid at any future election. The exceptions in the Durham act, relating to London and Norwich, were only made, becauſe there were particular ſtatutes

(9) It was ſtated, that he was to prove the right to be as mentioned in the brief; and likewiſe the agreement.

(1) *Vide Infra*, Caſes of Bedford, and Hallemere.

ſtatutes for the regulation of elections in thoſe places; and *they* ſhow pretty clearly that the legiſlature underſtood that there might be occaſional *admiſſions* of perſons who have an antecedent *right* (D).

During the courſe of the evidence produced by the counſel for the petitioners, in order to ſupport their charge of bribery, a witneſs was called to prove the payment of money, by a ſuppoſed agent of Cruger. On this, an objection was taken to their examining any witneſs as to the payment, till they ſhould firſt bring proof of the agency.—It was anſwered; That the circumſtances which would eſtabliſh both facts were ſo complicated, that they could not be ſeparated.—The point was argued; and the Committee, having cleared the court, after ſome deliberation among themſelves, over-ruled the objection (2).

On Monday the 20th of February, the Committee, by their Chairman, informed the Houſe that they had determined (3),

That the two ſitting members were duly elected.

And Mr. Burke, having been choſen likewiſe a burgeſs for the borough of Malton, in the county of York, made his election to ſerve for the city of Briſtol (4).

(2) *Vide ſupra*, Caſe of Hindon.
(3) Votes, p. 246. (4) *Ibid. loc. cit.*

NOTES

NOTES

ON THE CASE OF

BRISTOL.

PAGE 123. (A).[1] There is a very ſtrong inſtance of a perſon's being choſen, and obliged to ſit, againſt his will, which happened in this very city of Briſtol.

16 May, 1661. "Serjeant Charlton reports from the "Committee of privileges and elections, concerning the double "return for the city of Briſtol, That Thomas Earl of Oſſory, "and John Knight, Eſq. were returned as citizens to ſerve "for the ſaid city of Briſtol by one indenture; and Sir "Humphery Hooke, knight, and John Knight, were return-"ed by another indenture; and that Sir Humphery Hooke "ſubſcribed to the election of the Earl of Oſſory, and ſealed "to his return, and renounced his own election; and the "opinion of the ſaid Committee thereupon, that the return "was therefore ſingle; and that Sir Humphery Hooke might "renounce his return; and that the Earl of Oſſory ought to ſit, "*till the merit of the cauſe touching the ſaid election were deter-*"*mined.*

"Reſolved, That this Houſe doth agree with the Commit-"tee; and that the Earl of Oſſory do ſit in the Houſe, *till* "*the merits of the cauſe touching the ſaid election be determined.*" Journ. vol. viii. p. 250. col. 1.

21 September, 1666, (the ſame Parliament continuing) "Reſolved, That the matter concerning a member to ſerve "for the city of Briſtol, inſtead of the Lord Oſſory, be refer-"red to the Committee of elections; to examine the matter "of fact; and to report it to the Houſe." Journ. ſame vol. p. 626. col. 1.

6 October, 1666. "Sir Job Charlton reported from the "Committee of elections, touching the election for the city of "Briſtol, That the Committee had examined the matter refer-"red, and peruſed the report of the Committee; and the vote "of the Houſe thereupon, bearing date the 16th of May, 13°. "Car. IIdi. *regis:* Which he read, in his place, to the Houſe: "and alſo informed the Houſe, of two petitions; one hereto-

"fore

" fore preferred by the burgeſſes of the city of Briſtol to the " Committee of elections; and another lately by them tender- " ed, to be preſented to the Houſe: Which he delivered in at " the clerk's table.

" The queſtion being put, That it be referred to the Com- " mittee of elections, to hear the merits of the cauſe touching " the election for the city of Briſtol,

" The Houſe was divided——Yeas 94; Noes, 83. So it " was reſolved in the affirmative." Journ. ſame vol. p. 631. col. 2.

13 October, 1666. " Reſolved, That this Houſe doth agree " with the Committee of elections, in the order for the " mayor of the city of Briſtoll's attendance before them." Journ. ſame vol. p. 635. col. 1.

30 October. " Sir Job Charlton reports from the Com- " mittee of elections, That they had examined the merits of " the cauſe touching the election for the city of Briſtol; and " found, that Sir Humphry Hooke had much the majority of " voices: and that the opinion of the Committee was, that " Sir Humphry Hooke was duly elected, and ought to ſit.

" Reſolved, That this Houſe doth agree with the Commit- " tee, that Sir Humphry Hooke was duly elected, and ought " to ſit.

" Ordered, That **, the now mayor, heretofore ſheriff for " the city of Briſtol, be committed to the cuſtody of the ſer- " jeant at arms; for his miſdemeanour in making a falſe return " for the ſaid city." Journ. ſame vol. p. 644. col. 1.

There is no great probability that many inſtances of this ſort ſhould occur in our days; however, if a perſon were to be choſen, and returned, againſt his inclination, he might, ſince the ſtatutes of 9 Anne, cap. 5. and 33 George II. cap. 20. vacate his ſeat, by refuſing to take the qualification oath, appointed to be taken by the firſt of thoſe acts on the requiſition of any candidate or of any two voters at the election, or that which, by the other, every member is to take at the table of the Houſe before he ſhall preſume to ſit, or vote. For the ſtatutes enact, that, whenever any one preſumes to ſit or vote, without taking thoſe oaths, his election ſhall be void; and that a new writ ſhall iſſue. The eldeſt ſons, or heirs apparent of peers, or of any perſons qualified to be knights of the ſhire, and the members for the two univerſities, and for Scotland, are not required to have the qualifications made neceſſary for other members by the ſtatute of Queen Anne, nor obliged to take the oaths juſt mentioned; ſo that, if any one anſwering to either of thoſe deſcriptions were to be choſen, and returned, againſt his inclination, it would ſeem that he muſt ſubmit, unleſs the miniſter

ſhould

ſhould come to his relief, by beſtowing an incapacitating office upon him.

P. 126. (B) The Caſe of Beeralſton, as it is printed in the Journals, is *verbatim* as follows.

28 April, 1640. "Mr. Jones reports from the Committee "of privileges, That Mr. Strood, Mr. Hardinge*, and Sir "Amias † Meredith, were all returned for the borough of "Beere-elſton, in the county of Devon.—The ſixteenth of "March, upon true notice to the inhabitants, twenty-ſix ap- "peared; and at that time, Mr. Strood, Mr. Slainy, and Mr. "Wilde ‡ were competitors; and election was ſo far made at "that time, that Mr. Strood ſhould be a burgeſs for that town, "if either Mr. Slainy, or Mr. Wilde || were made knights of "the ſhire for the counties of Devonſhire or Cornwall.——Ad- "journed again to 17° *Martii*.——Then cometh other two "competitors, with Mr. Strood, Sir Ananias Meredith, and "Mr. Harris, who had ſeventeen voices, Sir Ananias Mere- "dith twelve voices, and Mr. Strood had but ſix.—This is the "fact of the caſe.

"But in the diſpoſition of it, by proof, the point falls out "to be,——Whether there was a clear election of Mr. Strood "the firſt day,——2. Whether with a condition:——3. Whe- "ther, though but with ſix voices at the laſt election, it ſhall "avoid the firſt election.

"In debate of this caſe, they all agreed, that, if in caſe he "was well elected the firſt day upon condition, it was good "*de facto*; for Mr. Wiſe was made knight of the ſhire: a "great part were of opinion, that a condition to an election "was void; for, by the laws of this realm, they conceive, "that elections ought to be free; and to have a condition, "precedent or ſubſequent to an election, was againſt law: "But theſe diſputes were at laſt ſet out of doors; and they "found the election abſolutely was clear for Mr. Strood the "firſt day, and no condition at all.—Mr. Wiſe and Mr. Slainy, "both before and after the election, made a declaration, that "if either of them were knights of the ſhire, Mr. Strood "ſhould have the *firſt* place, as a burgeſs.

"They conceived the election was clear; and, upon the "queſtion, they voted, that Mr. Strood was clearly elected.

"There was no exception taken, becauſe he was, *de facto*, "choſen the ſecond time.—If the firſt election was clear, the "ſecond concludes him not.

"They objected, his indentures were laſt returned.—Priority, "in the return of indentures, worketh no diſadvantage to him "that comes laſt.

"So

* Probably ſhould be Harris. † Probably Ananias.
‡ Probably Wiſe. || Ibid.

" So it was voted, the firſt election was good, and without " any condition: *and Mr. Harris ſworn, without exception.*

" It is ordered, that Mr. Strood ſhall be admitted to come " into the Houſe, according to the report of his due election; " and

" Declared, that no conditional election ought to be allowed." Journ. vol. ii. p. 14. col. 2.

Though this account is very confuſed and inaccurate, we may collect two things from it. In the firſt place, that it was not thought any objection to Mr. Harris that he had not been propoſed at firſt; and ſecondly, that it was a ſort of diſtinction to be the *firſt* burgeſs, that is, the firſt choſen. It appears from Glanville's Reports, not only in the caſe of Arundel, but in thoſe of Southwark, p. 7. and Stafford, p. 25. and in moſt of the others contained in that book, that, in thoſe days, the method was, firſt to propoſe and chooſe one member, who was called the *firſt* burgeſs or knight, and then the other. In the caſe of Chippenham, cited in the notes to the Introduction (W). (*ſupra*, p. 46.) anno 1624, " The bailiff was ordered to re- " turn John Maynard, Eſq. the *firſt* burgeſs." There is an inſtance in the firſt year of Henry V. of the two knights for the county of Lancaſter being returned by two diſtinct indentures of return, (Prynne Brev. Parl. rediviva, p. 163.) The adjournment of the election ſo as to leave an interval of *days* between the election of the firſt and ſecond member, did not vitiate the election of the ſecond. It is not even taken notice of in the above caſe of Beeralſton as irregular; nor in that of Chippenham, (as it is reported in Glanville, p. 51.) where there was a ſimilar adjournment. I do not know of any thing to hinder the election of the two members being made the one after the other, at this day.—As by the freeholder's oath, every freeholder muſt ſwear that he has not been polled *before* at that election, it may be ſuppoſed, that after having polled once for one member he could not come at a future time and vote again for another; but the fair conſtruction of the oath ſeems to be, that he has not polled before for the election of a member to fill the ſame place. That this is the ſenſe of the oath, I think we may infer from what the voters in the city of Norwich are obliged to ſwear at elections, where the ſame meaning is, only more explicitly expreſſed. The oath preſcribed to them by the ſtatute cited, *ſupra*, p. 133. is as follows. " You " do ſwear, that you are, and for twelve kalendar months have " been, admitted a freeman of the city of Norwich, and that " you have not been before polled at this election, or (in caſe " of an election for two citizens) *but for one perſon.*"

P. 135. (C) From the treating act of King William, and the ſtanding order of the Houſe of 21 October, 1678. (Journ. vol.

vol. ix. p. 517. col. 1.) * on which that act is founded, from the ſuppoſed cuſtom, and long practice at Briſtol, and the reſolution of the Houſe in the Norwich caſe, as well as from the tendency of the evidence which appears to have been given in a great variety of caſes of controverted elections, at different periods, it is very certain, that there has been long an idea, that the teſte of the writ was the period for aſcertaining when any acts were clearly done for the purpoſe of influencing an election, ſuch as giving money, treats, &c. or making votes. However, the deciſion in this caſe of Briſtol, will, probably, eſtabliſh the general validity of votes to which the only objection is, that the admiſſions were after the teſte of the writ; for, if that objection had been good, Mr. Brickdale muſt have ſucceeded againſt Mr. Burke.

P. 136. (D). The act for regulating elections in the city of Norwich, is not printed in the common editions of the ſtatutes, being one of thoſe public acts which are ſaid to be *of a private nature*.

* *Vide infra*, Caſe of St. Ives, Note (B).

VII.

THE

CASE

Of the BOROUGH of

CRICKLADE,

In the County of WILTS.

The Committee was choſen on Tueſday, the 14th of February, and conſiſted of the following Gentlemen.

Rt. Hon. Thomas Townſhend, Chairman,	Members for	Whitchurch
Lord Charles Spenſer, -		Oxfordſhire
Richard Wilbraham Bootle, Eſq.		Cheſter
Sir Cecil Wray, Bart. - -		Eaſt Retford
George Grenville, Eſq. -		Bucks
Jervoiſe Clarke, Eſq. - -		Yarmouth, Hants
Philip Raſhleigh, Eſq. - -		Fowey
Noel Hill, Eſq. - -		Shropſhire
Thomas Liſter, Eſq. - -		Clitheroe
Francis Anneſly, Eſq. - -		Reading
Thomas Edward Freeman, Eſq.		Steyning
John Smith, Eſq. - -		Bath
Richard Pennant, Eſq. - -		Liverpool
NOMINEES.		
Of Mr. Peach,		
John Bond, Eſq. - -		Corfe Caſtle
Of Mr. Dewar,		
Viſcount Beauchamp, - -		Orford

PETITIONERS.

Samuel Peach, Eſq. and John Dewar, Eſq.

COUNSEL.

For Mr. Peach.

Mr. Lee, Mr. Widmore.

For Mr. Dewar.

Mr. Mansfield, Mr. Murphy,

THE

THE CASE

Of the BOROUGH of CRICKLADE,

In the County of WILTS.

AT the laſt general election, Arnold Neſbit, Eſq; and William Earle, Eſq; were choſen members of Parliament for Cricklade. In December following, a vacancy happened, by the death of Mr. Earle; and, a new writ being ordered on the 20th of that month, the election came on, the 27th, and Mr. Dewar and Mr. Peach were both returned, by the ſame indenture. They both petitioned the Houſe on the 19th of January, and, this being the caſe of a double return, an early day was appointed for taking their ſeveral petitions into conſideration.

On Wedneſday, the 15th of February, the Committee being met, the two petitions were read.

Mr. Dewar's petition ſet forth; That he had a great majority of legal votes; but, that, notwithſtanding, Thomas Carter the bailiff and returning officer, had returned Mr. Peach together with the petitioner; Praying, therefore, that the name of Mr. Peach might be eraſed from the return, and the petitioner declared duly elected, or have ſuch other relief as the Houſe ſhould think meet (1).

Mr. Peach, in his petition, ſet forth; That on the ſecond day of the election, as the returning officer, the candidates,

(1) Votes, p. 123.

dinates, and electors, were proceeding to the place of polling, a riot commenced, which obliged the returning officer immediately to close the poll, when only forty-one, out of near two hundred persons entitled to vote, had given their suffrages; and that, on that account, Mr. Dewar and the petitioner were returned; That the petitioner was, by reason thereof, prevented from receiving the suffrages of a large majority of the electors, and of obtaining a legal right to represent the borough; That, from the death of Mr. Earle to the close of the poll, Mr. Dewar, or his agentts, had, by feasts and entertainments daily given at their expence to the electors, endeavoured to procure votes for Mr. Dewar, and had kept the borough in continual riot, tumult, and dissipation; That by the above means, and by the conduct of the returning officer, the sense of the electors at large had not been taken: He prayed, therefore, that the House would grant such relief as upon examination should appear just (2).

The material evidence, and facts of the case, were as follow:

On the first day, Carter, the returning officer, delayed beginning the poll for near two hours, waiting for the arrival of Mr. Nesbitt, the other member, who is lord of the manor, and was the declared partizan of Mr. Peach; Mr. Nesbitt, however, did not appear at the election.

The returning officer was attended by a gentleman of the bar, as counsel, who, at the general election, had acted in that capacity for Mr. Nesbitt, and, before this election began, had received a detainer from Mr. Peach, and, (as he said himself on his examination before the Committee) expected to be paid by him, for his attendance on the returning officer. He said, that, when he took the retaining fee from Mr. Peach, he told him that he accepted of it, only on condition of being at liberty to decide upon the disputed votes, according to certain general principles, which he had laid down, and followed, at the preceding election. He said, that both at the former, and the present election, he was almost entirely guided, as to the right of several voters who presented themselves, by the information of one King, a blacksmith, looking upon him to be the person who best knew the titles of the different electors. That he knew, however,

(2) Votes, p. 123, 124.

however, that King was much in the intereſt of Peach. He ſaid, that in receiving or rejecting votes, the returning officer followed his (the counſel's) directions implicitly, and was merely his *echo*.

There were warm diſputes and altercations, during the firſt day, between the counſel for Mr. Dewar, and the returning officer; the former, having, as the witneſſes called on the part of Mr. Peach ſwore, uſed very injurious expreſſions, and menacing geſtures, to the latter. But this was afterwards ſtrongly contradicted by the witneſſes on the other ſide.—One of the ſubjects of diſpute was the method of taking the poll. The returning officer, and the counſel for Peach, inſiſted that it ſhould be by houſe-row, beginning with the voters whoſe houſes were at the end of the town, and going along one ſide of the High-ſtreet, agreeable to the former practice. The counſel for Dewar was for taking the poll as the voters ſhould happen to offer. At the cloſe of the firſt day, the numbers were, 22 for Dewar, and 15 for Peach.

It was proved, and the counſel for the returning officer acknowledged, that, on the evening of the firſt day of the poll, he went to a meeting of Peach's counſel and agents; and that he was preſent at a conſultation they held, about the conduct, and the event, of the election; and alſo, that he had called at the lodging of the counſel for Peach the next morning, before he went to the place of polling.

One Archer ſwore, that he had, on the morning of the ſecond day of the poll, overheard a converſation at the lodging of the counſel for Peach, between that counſel, the returning officer's counſel, King, and others; when it was propoſed that, as ſoon as ever Peach ſhould be a-head, they ſhould cloſe the poll.

Archer had gone that very morning, and told this ſtory to Mr. Parker, agent for Dewar, and had carried him, to ſhow him a hole which went through the cieling of the room in which the counſel for Peach lodged, and the floor of the room above, to hear any thing that was ſaid below with the ordinary loudneſs of converſation. Archer had acceſs to that room, the maſter of the houſe being his uncle. But his evidence was flatly contradicted by every one of thoſe, who, according to that evidence, were preſent at, and took a ſhare in, the converſation in queſtion.

Several witneſſes were called to impeach the character, and credibility, of Archer; and, among others, his own uncle; and others were called, by the other ſide, to impeach the credibility of thoſe witneſſes.

When the returning officer, with the candidates and their agents, went on the ſecond morning, into the church where the election was holden, a ſort of ſcuffle happened at the door of the church, between Mr. Herbert a member of the Houſe of Commons, and Mr. Benſon a merchant in London, who had accompanied Peach, and had been made a conſtable on the occaſion. Benſon puſhed Herbert from the door, as he had endeavoured to enter, on which Herbert collared him, he (Benſon) not having any ſtaff that could diſtinguiſh him as a conſtable. After this, they, and a number of other people who were at the porch of the church, ruſhed in; and the diſpute between Herbert and Benſon ſtill continuing, ſeveral of Peach's friends cried out "*a riot, a riot,*" and a good deal of confuſion aroſe. On this, the counſel for the returning officer directed him to cloſe the poll, which he did; and they left the church together, although earneſtly entreated by Dewar and his friends to remain. In their way home, they walked directly through the croud, without meeting with any moleſtation.

Both the returning officer, (who is a man of ſeventy-ſix years of age) and his counſel, ſwore, that they thought they could not have continued at the church, without the moſt imminent danger; That threats of a moſt alarming nature had been thrown out, for ſeveral days previous to the election, againſt both; but, that they had only heard of thoſe threats at ſecond hand, and, they could not ſay they ſaw any blow, or any act of violence, done by any body, at the time when the poll was ſhut.

Many perſons of character, who were called on the part of Dewar, ſwore, on the contrary, that neither before nor during the election, any thing like a riot, or diſturbance, ſufficient to terrify any reaſonable man, had happened: nay, that they believed no town had ever been more quiet at the time of an election; except that there were vehement altercations among the counſel. Thoſe witneſſes, alſo, ſwore, that, while the poll laſted, the returning officer, and his counſel, acting obviouſly in concert with the counſel and agents for Peach, had ſhown the moſt glaring partiality towards that ſide; admitting votes without enquiry for Mr. Peach,

Peach, and rejecting others without examination which were tendered for Mr. Dewar.

When the poll was closed, and the returning officer had retired with his counsel to his inn, Mr. Herbert came to him, and entreated him to renew it, promising to give any security, he should require, that he would not molest Benson, nor occasion any disturbance; and desiring, if it were thought necessary for the quiet of the election, that Benson and he might both be committed till it should be over; But the returning officer, and his counsel, absolutely refused to open the poll again. His counsel declared, in giving his evidence, that, *if any disturbancē had arisen*, in the course of the poll, and Peach happened to be a-head, he was determined that the poll should be closed immediately, and Peach *singly* returned.

When the returning officer had, in this manner, refused to renew the poll, all the electors in the interest of Mr. Dewar went and gave their voices, before a constable, for him. Mr. Peach's friends were apprized of this poll before the constable, and were warned to attend, and give their votes; but none of them came.

There was no evidence produced sufficient to bring home treating or entertaining the electors, to Dewar, or his agents.

The counsel for Mr. Dewar insisted,

That, as he had a clear majority at the close of the poll, the returning officer was bound, by his office, to return him solely, and that the Committee ought to determine that he was duly returned and ought to sit. That the House might, perhaps, after the return was amended, admit such of the electors as had not an opportunity of giving their suffrages to petition on that ground, and so bring the merits of the election in question. That there was such a proceeding in the case of Pontefract, reported by Glanville, where, though the circumstances were not exactly similar to those of the present case, yet the principle was the same. In that case, two returns were made to the sheriff, by different persons. The poll had been closed, in consequence of a riot, before the election was over. The House ordered that the person returned by the proper officer, should take his seat, although afterwards, in consequence of a petition from the electors who had been deprived of an opportunity of giving their votes, the election was avoided. That indeed it is said, in

that caſe, that, where the return is irreconcileably repugnant, neither of the parties are to be admitted into the Houſe. But that this is explained by what follows, for the words of Glanville are, "That neither of the parties are to be admit-"ted into the Houſe, *till the return be amended*," which was what was prayed to be done by Dewar's petition. That, in the preſent caſe, there was no petition, no complaint, from the electors; and, whatever *they* might have a right to do, Mr. Peach was eſtopped from complaining that the poll was improperly cloſed, ſince the cloſing it was virtually, and in ſubſtance, his own act. That both the returning officer, and his counſel, acted in concert with Peach's counſel; that their acts were, in fact, his, and they were mere agents for Peach. That it was clear, from irreſiſtible evidence, that there was no danger, nor appearance of danger, to juſtify their abrupt departure from the place of the poll, or their refuſal to renew it. That, if they were afraid, they had taken a very extraordinary manner of pacifying Mr. Dewar's partizans, for they had done the very thing which, of all others, was moſt likely to exaſperate them. That fear could not poſſibly be their motive for not renewing the poll, after the diſturbance occaſioned by the diſpute between Herbert and Benſon as adjuſted, ſo as not to leave any chance of its being revived. That if the Committee ſhould credit the teſtimony of Archer, they muſt believe that there was a premeditated deſign to break off the poll whenever the numbers ſhould happen to be in favour of Peach. That the returning officer's counſel had acknowledged, that *if any diſturbance ſhould ariſe*, Peach being a-head, he was determined that the poll ſhould ſtop, and Peach be returned. That this certainly afforded a ſtrong preſumption that Peach's friends, when they began to find that it was in vain to wait for even a momentary majority againſt Dewar, had themſelves, by concert, begun the ſcuffle at the door of the church, in order to have the pretext of a riot, as an excuſe for ſtopping the poll, and making a double return. That the charge of treating and corruption had not been ſupported by the ſmalleſt evidence. That it would be very extraordinary if Mr. Peach, without having proved a ſingle allegation of his petition, ſhould obtain the only end he could propoſe by it. That ſurely the Committee would never ſuffer him, contrary to a known maxim of law, to take advantage of his own wrong. Nor after he had ſhut up the poll, becauſe he found that, on that occaſion, the

he major part of the electors were againſt him, would they, by declaring the election to be void, enable him to gain the time and opportunity he wanted, of ſtrengthening his party, and undermining the intereſt of Mr. Dewar.

They likewiſe urged, that the groſs partiality and miſconduct of the returning officer, and his counſel, ought to be laid before the Houſe; there never having been an occaſion of the ſort which called more loudly for cenſure and puniſhment. That if ſuch an example were to paſs unnoticed, others, at future elections, would be tempted to imitate their conduct, truſting their conduct, truſting to meet with the ſame impunity. That, in a caſe very like the preſent, which happened in this very borough, in 1689 (1), the returning officer, though much leſs culpable than the preſent, was ordered into cuſtody.

On the part of Mr. Peach, it was ſaid,

That the riot had been ſufficiently proved; but that, if it had not, the allegation in the petition was only matter of form, and to be conſidered as reſembling "*the inſtigation of* "*the devil*," laid in an indictment, which is never meant to be proved. That no credit could be given to Archer. That his teſtimony did not correſpond with the event. That an intention of ſtopping the poll when Peach ſhould be a-head, could never prove that it was ſtopt, from a pre-concerted deſign, at a time when Dewar was a-head. That whether the returning officer was influenced by that ſort of fear which the law ſuppoſes to fall *in conſtantem virum*, or not, ſtill as the poll, in fact, was ſhut before all the electors had an opportunity of giving their votes, the election muſt be conſidered as void.

They *ſuggeſted* that a petition of many of the electors had been prepared, and was ready to have been preſented, but that it was not, becauſe thoſe who had ſubſcribed it were neceſſary as witneſſes, and therefore could not be parties too.

They defended the conduct of the returning officer, and his counſel. They ſaid that the counſel had adviſed the other to follow the ancient uſage of the place in taking the poll by houſe-row, contrary to the wiſhes of Dewar, and his friends. That he likewiſe had adviſed him to reject all the votes under a certain deſcription, becauſe, in his opinion, they

(2) Journ. vol. x. p. 72, 73. *Vide infra*, p. 151.

they were bad. That, whenever the right of election at Cricklade came to be agitated, the rule he laid down would probably be eſtabliſhed. That it was not his fault that moſt of the votes under that deſcription were tendered for Dewar. Yet this was, in truth, the whole of what had been called groſs partiality. That the taking a retainer from Peach, with the previous condition of deciding according to his own judgment, and even the aſſociating with Peach's friends, was, at moſt, an imprudent part, but was neither criminal, nor ſuch as merited either the animadverſion of the Committee, or the cenſure of the Houſe.

In the courſe of the evidence, Mr. Dewar's counſel offered to produce the poll taken by the conſtable, in order to ſhew that a large majority of the electors of Cricklade would have voted for him. If that could be ſhown, they ſaid, he muſt be declared duly elected.

This evidence was objected to.

It was ſaid to be inadmiſſible, that poll not having been taken before a legal returning officer; that it was not mentioned in Dewar's petition, and, beſides, that it could not aſcertain the proportion of electors in Dewar's intereſt, ſince none of Peach's friends had polled; and that they were not obliged to attend or vote on that occaſion, as they had not been, and could not have been, ſummoned according to law.

To this it was anſwered,

That the conſtable's poll, on this occaſion, was the beſt evidence that could be given of the fact: much better than the *viva voce* teſtimony of the perſons who had polled could now be; ſeeing that, ſince that time, they had been expoſed to influence, and might have been practiſed upon by the other candidate. That the conſtable's poll would be a direct anſwer to that part of Peach's petition, where he alledges, that the majority of voices would have been in his favour if the election had not been interrupted. That it was of no conſequence that none of Peach's friends attended, for it could be ſhewn that out of the number of voters which he himſelf ſtated to be in the borough, by far the greater part were for Mr. Dewar. That there were caſes which proved that where a returning officer refuſes to complete the poll, the electors may go and vote before a conſtable, or even a private perſon, and that their poll will be allowed by the Houſe, and the merits of the election decided upon it.

That

That in this very borough, 1 April, 1689, in a caſe circumſtanced like the preſent, the returning officer, under a pretence of danger, cloſed the poll before all the electors had voted. The numbers then ſtood thus: 21 for Webb, one of the candidates, and only 5 for Freke, the other candidate. The returning officer refuſed to renew the poll, on which it was continued by the conſtable, and when the two liſts were added together, the numbers were, for Freke 50, and for Webb only 25. The Houſe allowed the conſtable's poll, and declared Freke duly elected (4).

That a ſtronger caſe ſtill was that of Liverpool, 5 March, 1729-30. On that occaſion, witneſſes being examined as to the mayor's withdrawing himſelf from the place of polling, before he had taken the ſuffrages of ſeveral perſons who tendered their votes for the petitioner; and one Henry Orme being called, and examined, and producing a liſt taken by him of divers perſons, who gave their votes for the petitioner, after the mayor had left the place of polling; and the ſitting member's counſel objecting againſt the admitting ſuch evidence; the point was argued, and the counſel being directed to withdraw; the Houſe reſolved, "That "the paper produced by Henry Orme, containing a liſt "taken by him of perſons who voted for the petitioner, "after the mayor had left the place of polling, be admitted "as evidence of ſuch perſons voting (5)."

That, in the former of theſe two caſes, it might be ſaid that the electors on both ſides waved any objection they might have made to the illegality of the perſon who took the poll, perſons having, in that caſe, voted on both ſides before the conſtable. But that this obſervation would not apply to the ſecond, where none voted but on one ſide; yet the Houſe admitted the poll then taken, though by a private perſon, to be given in evidence.

In their reply, on this point, the counſel for Mr. Peach took notice of the diſtinction between the caſe of 1689, and the preſent; and they obſerved that it was more neceſſary now that the legal returning officer ſhould take the poll, than it was when either of the two former caſes happened, ſince now, by the ſtatute of George the Second (6), every voter is

(4) Journ. vol. x. p. 72, 73. *Vide ſupra*, 149.
(5) Journ. vol. xxi. p. 476. col. 2.
(6) 2 Geo. II. cap. 24. That act took effect on the 24th of June,

is liable to have the bribery oath tendered to him, "which "he is to take before the returning officer, or others, le- "gally dputed by him." That this oath the conſtable could not adminiſter, and therefore could not be at all conſidered as capable of taking a legal poll.

The Committee, after long deliberation, reſolved,

That the conſtable's poll ſhould not be given in evidence.

They likewiſe reſolved,

That parole evidence ſhould not be admitted to prove what perſons polled before the conſtable.

On Tueſday, the 21ſt of February, the Committee, by their Chairman, informed the Houſe, that they had determined,

That neither Mr. Peach nor Mr. Dewar were duly returned; and that the laſt election for the borough of Cricklade was a void election.

And they did not make any ſpecial report.

☞ The counſel for Mr. Peach began in this caſe, according to the ſtanding order of March 1727-8; "he being "firſt named in the return (7)." This circumſtance depended on the returning officer; but, from the nature of the caſe, Mr. Dewar was more properly the *plaintiff*; and, for that reaſon, I have given the firſt place to the arguments of his counſel.

June, 1729. The writ in the Liverpool Caſe, which was on a vacancy, was ordered on the 14th of May of that year. Journ. vol xxi. p. 76. col. 2. So that the election probably happened before the act was to take place; and, therefore, the diſtinction taken by the counſel for Mr. Peach applies to *both* the caſes cited on the other ſide.

(7) Vide caſe of Milborne Port, *ſupra*, p. 51,

NOTES

VIII.

THE

CASE

Of the BOROUGH of

NEW RADNOR,

And its CONTRIBUTORY BOROUGHS

IN THE

COUNTY OF RADNOR.

The Committee was choſen on Friday, the 17th of February, and conſiſted of the following Gentlemen.

John Elwes, Eſq. Chairman, -	Members for	Berkſhire
Francis Page, Eſq. - -		Oxford Univ.
Charles Garth, Eſq. - -		Devizes
Sir George Robinſon, Bart. -		Northampton
Abel Smith, Eſq. - -		Aldb. Yorkſhire
Hon. Thomas Francis Wenman		Weſtbury
Thomas Halſey, Eſq. - -		Hertfordſhire
Sir Henry Houghton, Bart. -		Preſton
Anthony James Keck, Eſq. -		Newton, Lan.
William Chaytor, Eſq. - -		Penryn
Lord George Gordon - -		Luggerſhall
Ambroſe Goddard, Eſq. -		Wiltſhire
Filmer Honywood, Eſq. - -		Steyning

NOMINEES.

Of the Petitioners.

Bamber Gaſcoyne, Eſq. - Truro

Of the Sitting Member.

William Adam, Eſq. - - Gatton

PETITIONERS.

Edward Lewis, Eſq.

Several Burgeſſes of the Borough of New Radnor, and its contributory Boroughs.

Sitting Member.

John Lewis, Eſq.

COUNSEL.

For the Petitioners.

Mr. Mansfield, Mr. Hardinge.

For the Sitting Members.

Mr. Bearcroft, Mr. Lee.

THE CASE

Of the BOROUGH of NEW RADNOR,

And its CONTRIBUTORY BOROUGHS.

ON Saturday the 18th of February, the Committee being met, the two petitions were read. Both contained a general allegation that Edward Lewis, Esq; the petitioner, had a great majority of legal votes, and was duly elected (1).

Then the last determination of the House of the right of election was read; and after that, the standing order of 16 Jan. 1735-6 (2).

The last determination is as follows:

12 November, 1690. Resolved, "That the right of "election of burgesses to serve in Parliament for the bo-"rough of New Radnor, is in the *burgesses* of Radnor, "Ryader, Knighton, Knucklas, and Kevenlice only (3)."

The only question, in this case, was upon the sense of the last determination.

The counsel for the petitioners insisted; That by the word "*burgesses*," is meant, all burgesses, whether resident or non-resident; and that, by the standing order of 1735, the counsel for the sitting member were not at liberty to go into any proof of the contrary.

The

(1) Votes, 6 Dec. p. 21, 22. 8 Dec. p. 56.
(2) *Supra*, p. 51.
(3) Journ. vol. x. p. 469. col. 1, 2.

The counſel on the other ſide contended; That, by the ſtanding order, the Houſe could never intend to prohibit the explanation of ambiguous or equivocal words in laſt determinations; and ſaid, that they only propoſed to explain the word "*burgeſſes*" in the determination, and to ſhow that the Houſe muſt have underſtood by it, in this inſtance, not "*burgeſſes at large*," but "*burgeſſes inhabitants.*"

The Committee were of opinion, that they were not precluded from ſuch explanation, by the ſtanding order of 1735; and, as the averment lay on the ſitting member, it was agreed at the bar, and conſented to by the Committee, that he ſhould be conſidered as *actor* in the cauſe, and that his counſel ſhould begin.

COUNSEL for the ſitting member.

By the ſtatute of 27 Hen. VIII. cap. 28, §. 29. the counties and boroughs of Wales were firſt authorized to ſend members to Parliament. The 3d ſection of the ſtatute of the 35th of the ſame King, cap. 11. is in theſe words:

"Foraſmuch as the *inhabitants* of all cities and boroughs in the twelve ſhires within Wales, and in the county of Monmouth, not finding burgeſſes for the Parliament themſelves, muſt bear and pay the burgeſſes wages within the ſhire-towns of and in every the ſaid twelve ſhires in Wales, and in the ſaid county of Monmouth, (be it enacted,) that the *burgeſſes* of all and every of the ſaid cities, boroughs and towns, which be and ſhall be contributory to the payment of the burgeſſes wages of the ſaid ſhire towns, ſhall be lawfully admoniſhed, by proclamation or otherwiſe, by the mayors, bailiffs or other head-officers of the ſaid towns, or by one of them, to come and to *give their elections* for the electing of the ſaid burgeſſes, at ſuch time and place lawful and reaſonable, as ſhall be aſſigned for the ſame intent by the mayors, (&c.) *In which election*, the burgeſſes ſhall have like voice and authority to elect, name, and chooſe the burgeſſes of every the ſaid ſhire-towns, like and in ſuch manner as the burgeſſes of the ſaid ſhire-towns have or uſe."

It is evidently the object of this clauſe of the ſtatute to communicate a right of voting for the member of parliament, to the *inhabitants* of the boroughs which were contributory

contributory to the payment of his wages; therefore, when it is enacted, that the *burgeſſes* of all the boroughs which ſhall be contributory to ſuch payment ſhall *give their elections*, the meaning undoubtedly is, that the *burgeſſes inhabitants*, and they only, ſhould have a right to vote. The right of election, therefore, being confined by an *act of Parliament* to the burgeſſes inhabitants, if the *reſolution of the Houſe* had in direct terms contradicted this act, it would have been *illegal*, till the ſtatute of the 2nd of George the Second, which made every laſt determination final. Now though there are, perhaps, too many inſtances of laſt determinations which, when made, were clearly againſt law, yet, if the determination concerning New Radnor is capable of a conſtruction agreeable to law, that conſtruction ought to be adopted, rather than one in direct oppoſition to the words of a ſtatute.

In the caſe of the borough of Denbigh and its contributory boroughs, in 1743-4, the petitioners contended, "That the right of voting was in the burgeſſes *at large*:" they produced ſeveral returns in the reigns of Edward the Sixth, Elizabeth, Charles the Firſt, Charles the Second, James the Second, William and Mary, George the Firſt, and George the Second, and alſo ſeveral witneſſes, to prove, that ſeveral electors named in thoſe returns were not *reſident* burgeſſes of the boroughs, and to prove likewiſe, that the uſage had been for *non-reſident* burgeſſes to vote. On the part of the ſitting members, the 29th ſection of the 27th of Henry the Eighth, cap. 28. and the third and fourth ſections of the 35th of Henry the Eighth, cap. 11. were read: They called no witneſſes. A motion was firſt made, and the queſtion propoſed, "That "the right of election is in the burgeſſes *at large*, of," &c. To this an amendment was propoſed, by leaving out the words "*at large*," and inſerting the word "*inha*-"bitants" in their ſtead, and the queſtion being put, "That the words "*at large*," ſtand part of the queſti-"on," the Houſe divided; and it paſſed in the negative. The queſtion being then put, "That the word '*inha*-'*habitants*' be inſerted inſtead thereof," the Houſe again divided; and it paſſed in the affirmative. Then the main queſtion being put, the Houſe reſolved, 7 Feb. 1743-4,

"That the right of election of a burgeſs to ſerve in "Parliament for the borough of Denbigh, in the coun-

"ty

" ty of Denbigh, is in the *burgeſſes, inhabitants* of the bo-
" roughs of Denbigh, Ruthyn, and Holt, reſpectively (4)."

This caſe is exactly in point; the Houſe, upon the ground of the ſtatutes, determined that only *reſideno* burgeſſes have a right to vote.

In the caſe of Cardigan, indeed, the Houſe, in 1730, thought proper, in the very face of the act of Henry the Eighth, to extend the right of voting to out-burgeſſes, but even there they deemed it neceſſary to add the words " *at large.*"

7 May, 1730. Reſolved, " That the right of electi-
" on of a burgeſs, to ſerve in the Parliament for the
" town of Cardigan, in the county of Cardigan, is in
" *the burgeſſes at large* of the boroughs of Cardigan, Aberyſt-
" with, Lampeter, and Atpar only (5)."

This expreſſion, or ſome other of the ſame import, is familiar to the Houſe, when they determine that the right of election extends to out-burgeſſes. Is it not therefore reaſonable to conclude, that ſome ſuch expreſſion would have been made uſe of in the inſtance before the Committee, if the Houſe had meant that the right was ſo in the boroughs in queſtion?

In 1690, when the laſt determination was made, the queſtion was not, Whether the out-burgeſſes had a right to vote; but, Whether the burgeſſes of Paines-caſtle and Preſteigne had a concurrent right with thoſe of the other boroughs. The numbers on the poll, on that occaſion, were ſo few, that it cannot be ſuppoſed that any out-burgeſſes voted. There were only 173 voted for Mr. Harley, and 172 for Sir Rowland Gwyn, beſides 45 burgeſſes of Preſteigne, and 34 of Paines-caſtle, who voted for Gwyn. The attention of the Houſe not being called to the ſubject of the preſent controverſy, nothing was ſaid concerning reſidency, and that point remained unaffected by the determination (A).

By the charter of New Radnor, none can be burgeſſes in that place but inhabitants can vote. It would be ſtrange if the ſhire-town were to be more limited in this reſpect than the other ſmall contributory boroughs.

☞ They

(4) Journ. vol. xxiv. p. 550. col. 2.
(5) Journ. vol. xxi. p. 574, col. 1.

☞ They offered to give this charter in evidence; but, as it bears date ſo late as the 12th of the late King, the reading it was objected to, for it was ſaid that it could not affect the ſenſe of a determination made ſo long before; and the Committee reſolved that it ſhould not be read.

Evidence was likewiſe offered to ſhow, that, of late years, great numbers of out-burgeſſes had been made in the ſmall contributory boroughs, ſufficient to drown entirely the votes of the electors for the ſhire town. This was objected to; it was ſaid, that although it might prove the *abuſe* of the right contended for by the petitioner, and might perhaps, on that account, be proper to be laid before the Parliament, if a remedy to that abuſe ſhould be applied for, yet it was entirely improper for the conſideration of a court appointed ſolely to try the *exiſtence* of the right. The Committee rejected the evidence.

COUNSEL for the petitioner.

The reſolution of 1690 is ſo clear as not to require explanation; which, though neceſſary where the words are very ambiguous, is always a dangerous thing, and has too often furniſhed a pretext for overturning laſt determinptions. "*Burgeſſes*" is a general word, and as applicable to an outrburgeſs as to one who is reſident in the borough. That whon the word "*burgeſſes*" is uſed, unqualified by any reſtraining epithet, it means "burgeſſes "at large," is clear from the caſe of Aldborough in Suffolk. On the 23d of December, 1709, the Houſe had determined,

"That the right of electing burgeſſes to ſerve in Par-"liament for the borough of Aldborough, in the county "of Suffolk, is in the bailiffs, burgeſſes, and freemen, "not receiving alms (6)." On the 16th of June, 1715, a report was made from the Committee of privileges and elections on a petition from that borough, by which it appears that an attempt had been made, notwithſtanding the determination of 1709, to limit the right to the burgeſſes reſident. This attempt had ſucceded with the Committe, but *they* were ſenſible that the words uſed in 1709 would not admit of ſuch a limited ſenſe; they did not therefore endeavour to make an explanatory reſolution, but they firſt reſolved,

"That

(6) Journ. vol xvi. p. 257. col. 1.

"That it is the opinion of this Committee, that the "right of election of members to serve in Parliament for "the borough of Aldborough, in the county of Suffolk, "is *not* in the bailiffs, burgesses, and freemen, of the said "borough, not receiving alms."

And then, having removed the former determination out of their way, they proceeded to another resolution, viz.

"Resolved, That it is the opinion of this Committee, "that the right of election of members to serve in Par-"liament for the borough of Aldborough, in the county "of Suffolk, is in the bailiffs and burgesses *resident* with-"in the said borough, and not receiving alms (7)."

Does not this proceeding of the Committee demonstrate that, in their opinion, the word "*burgesses*," without any qualifying epithet, could not signify, in a limited sense, only burgesses *resident*?—The House did not agree to either of the resolutions of the Committee (8), so that the determination of 1709 continues to be the last determination of the House, of the right of election in Aldborough.

In the case of Wells, 18 April, 1729, the House resolved,

"That the right of election of citizens, to serve in Par-"liament for the city of Wells, in the county of Somerset, "is in the mayor, masters, burgesses, and freemen, of the "said city, who are admitted to their freedom in any of "the seven companies within the said city, being thereunto "entitled by birth, servitude, or marriage (9)."

And in consequence of that resolution, 11 March, 1734-5, counsel were restrained from giving evidence, "that it is a necessary qualification of a burgess, of the city of Wells, that such person, previous to his being made a burgess, was a freeman of the said city; admitted to his freedom in one of the seven companies within the said city; entitled to such freedom by birth, servitude, or marriage" (1).

The last determination of the right of election in Chippenham is as follows:

9 April,

(7) Journ. vol. xviii. p. 176. col. 1.
(8) Journ. vol. xviii. p. 176. col. 2.
(9) Journ. vol. xxi. p. 329. col. 2.
(1) Journ. vol. xxii. p. 409. col. 2.

9 April, 1624. Reſolved, "That the new charter alters "not the cuſtom; and that the burgeſſes and freemen, "more than twelve, have voice in the election (2)."

28 January, 1741-2. The counſel for the petitioners inſiſted, that the words, "*burgeſſes and freemen*," in the above determination, mean only, *ſuch burgeſſes and freemen as are inhabitants, houſekeepers of the ancient houſes, called free or burgage houſes, within the ſaid borough* (3). A motion was made, and the queſtion being put, "That in the laſt determina-"tion of this Houſe, of the right of election of members to "ſerve in Parliament for the borough of Chippenham, in "the county of Wilts, made the 9th day of April, 1624, "(which is, &c.) the words "*burgeſſes and freemen*," men-"tioned in the ſaid reſolution, mean only ſuch bur-"geſſes and freemen *as are inhabitants, houſeholders of the* "*ancient houſes, called free or burgage houſes, within the ſaid* "*borough*, It paſſed in the negative (B)."

In the caſe of Seaford, 10 February, 1670-1, the queſtion being, Whether the right of election was in the bailiffs, freemen, and jurors, *only*, or in the populacy; the Committee, and the Houſe, reſolved,

"That the bailiff, jurors, and freemen, had not *only* "voices in election, but that the election was in the *popu-*"*lacy* (4)."

10 December, 1761. A motion being made, and the queſtion put, "That the counſel for the petitioners be ad-"mitted to give evidence, to ſhew that in the ſaid deter-"mination (of 1670) the words '*bailiff, jurors, and freemen*,' "mean *ſuch bailiff, jurors, and freemen only as are reſident* "*within the ſaid town and port*;" It paſſed in the nega-"tive (5) (C).

Thoſe three caſes ſhew how averſe the Houſe has always been from reſtraining the ſenſe of general words in laſt determinations.—The caſe of Wells is particularly ſtrong, for the words of the reſolution of 1729 afforded a conſtructive argument in favour of the explanation contended for in 1734.

It

(2) Journ. vol. i. p. 759. col. 1. See alſo Glanville, p. 47.
(3) Journ. vol. xxiv. p. 65. col. 2. p. 66. col. 1.
(4) Journ. vol. ix. p. 200. col. 2.
(5) Journ. vol. xxix. p. 83. col. 1.

It is ſaid, that iff the determination in the caſe of Radnor had been intended to extend to the out-burgeſſes, the words "*at large*" would have been added; it is at leaſt, equally fair to ſay, that the words "*inhabitants*," or "*reſident*" would have been added, if the Houſe had meant "*burgeſſes*," in a limited ſenſe. Such addition is often made uſe of by the Houſe; and was in the caſe of Denbigh. A general word may require ſuperadded words to reſtrain its meaning; it cannot require any to enlarge it.

As to the caſe of Denbigh, it will have little weight, if we conſider the æra when it happened; the ſtate of parties at that time; and that the numbers, on the firſt diviſion, were but 177 to 174, and, on the ſecond, only 175 to 174; ſo that the queſtion was carried only by a majority of one. Every reaſonable man will think that, at that time, if the two contending parties could have ſhifted their grounds, and each have taken that of his opponent, the determination would have been directly contrary to what it was. But, whatever our conjectures may be on that head, it is to be obſerved, that Denbigh was then a maiden borough; there was no prior determination to which the Houſe, by virtue of the ſtatute of George the Second (6), was bound to adhere, as there is in the caſe now before the Committee.

If the words of the act of the 55th of Henry the Eighth were as clear and explicit as they are perplexed and equivocal, yet there are two anſwers to be given to the arguments drawn from that ſtatute.

In the firſt place, conſtant uſage in favour of the out burgeſſes would be ſufficient to annul the effect of ſuch an obſolete law.

By the 1ſt of Henry the Fifth, cap. 1. the elect for cities and boroughs were to be *reſiant*, dwelling, and free in the ſame cities and boroughs; and by that ſtatute, and the 8th of Henry the Sixth, cap. 7. the 10th of Henry the Sixth, cap. 2. and the 23d of Henry the Sixth, cap. 14. as to knights of the ſhire, both the electors and the elected were to be *reſiant* in the reſpective counties.

The proviſions of theſe acts concerning reſidency were not formally repealed by the legiſlature till laſt year (7); yet there is not the ſmalleſt doubt but that ſubſe-

(6) 2 Geo. II. cap. 24. § 4.
(7) 14 Geo. III. cap. 58.

quent uſage had ſo far abrogated them, that the objection of non-reſidence would not have been admitted for more than two centuries before the 14th of George the Third, to vitiate the vote of a freeholder, or to avoid the election of a member of Parliament, otherwiſe duly qualified. The legiſlature itſelf, in the laſt mentioned ſtatute, has declared that the proviſions in thoſe of Henry the Fifth and his ſon, were become *obſolete* (D). Thoſe ſtatutes were as binding in Wales as in England; for by the 27th of Henry the Eighth, cap. 28th. the law of England reſpecting elections is communicated to Wales.—When was it ever thought, in any controverted election for a Welſh county, or borough, that either of the parties could avail themſelves of any of thoſe ſtatutes?

In the ſecond place, as has been acknowledged by the counſel for the ſitting member, whatever the law might be before the determination in 1690, however repugnant it might be to that determination, ſtill the right of election is to be according to the determination, and not according to any prior rule; for the effect of the ſtatute of the 2nd of George the Second (8) is to give every laſt determination in the Houſe of Commons on the right of election, the force of an act of Parliament, and to operate the repeal of any thing antecedent and contrary to ſuch determination.

In other Welſh boroughs, the right of election has been determined to be in the burgeſſes, *generally*, notwithſtanding any thing contained in the ſtatutes of Henry the Eighth. Beſides the caſe of Cardigan, which has been cited on the other ſide, thoſe of Caermarthen and Pembroke are proofs of this poſition.s

19th March, 1727-8. Reſolved, "That the right of "election of burgeſſes, to ſerve in Parliament for the "borough of Caermarthen, is in the burgeſſes of the ſaid "borough (9)."

23 Februry, 1711-12. Reſolved, "That the mayor "and burgeſſes of the ancient borough of Wiſton, in the "county of Pembroke, have a right to vote in the elec"tion of a member to ſerve in Parliament for the bo"rough of Pembrook (1) (E)."

If

(8) 2 Geo. II. cap. 24. §. 4.
(9) Journ. vol. xxi. p. 90. col. 2.
(1) Journ. vol. xvii. p. 109. col. 2, 110. col. 2.

If it has been proved that in the language of the Houſe of Commons, the word "*burgeſſes*" includes both reſident and out-burgeſſes, theſe two caſes are to be conſidered as inſtances to be added to thoſe of Radnor and Cardigan, where the Houſe diſregarded any inferences that might be drawn from the ſtatutes of Henry the Eighth, againſt the right of out-burgeſſes.

It has been alledged, that reſidence or non-reſidence was not the point in litigation in 1690; but there is no rule which ſays, that, to make a laſt determination final, as to any particular point, that point muſt be directly litigated (2); and certainly the queſtion in general, "What is the right of election?"

In the caſe of Cardigan, the point of reſidency was one of thoſe on which the parties were directly at iſſue; for it appears, by the Journals, that the counſel for Mr. Lloyde inſiſted, that the right was in the burgeſſes (*generally*) of Cardigan, Aberyſtwith, Lampeter, and Atpar; the counſel for Mr. Powell contended, that it was only in the burgeſſes *reſident* (3).

In the caſe of Pembroke, the act of the 35th of Henry the Eighth was referred to.

Nay, in the caſe of Flint, where the right of election was determined to be only in the *inhabitants*, it appears, by the Journals, that the Houſe proceeded, not on the ground of the ſtatute of the 35th of Henry the Eighth, but on evidence that ſuch had been the conſtant uſage (4).

☞ The counſel for the petitioner offered, if it ſhould be thought neceſſary, to produce evidence to ſhew by inference that out-burgeſſes voted at the election for New Radnor in 1690. But this was not required, either by the Committee, or the counſel on the other ſide.

On Monday, the 20th of February, the Committee, by their Chairman, informed the Houſe that they had determined,

That Edward Lewis, Eſq; the petitioner, was duly elected, and ought to have been returned (5).

(2) Vide *infra*, Caſe of Pontefract.
(3) Journ. vol. xxi. p. 573. col. i.
(4) Journ. vol. xxi. from p. 173, to p. 175.
(5) Votes, p. 250.

NOTES

ON THE CASE OF

NEW RADNOR.

PAGE 157. (A). Mr. Gray reports from the Committee of privileges and elections, " Upon the petition of Robert Harley, Esq. complaining of an undue return and election of " Sir Rowland Gwyn for the borough of New Radnor;

" That the question between the petitioner and sitting " member was, concerning the right of election.——That the " petitioner insisted, that the right of election lay in the burgesses of Radnor, Ryader, Knighton, Knucklas, and Kevenlice only—That the sitting member insisted, that Painescastle and Presteigne, had an equal right in electing with the " said other towns." Journ. vol. x. p. 469. col. 1.

P. 160. (B). The case of Chippenham was as follows. The counsel for the petitioners insisted, " That the words, " *burgesses and freemen*," mentioned in the last determination, " mean only such burgesses and freemen, as are *inhabitants*, " householders of the ancient houses, called free, or burgage " houses, within the said borough." They went into evidence to prove that the usage, since 1624, had been for such persons *only* to vote. The counsel for the sitting members, alledged, " That the words " *burgesses and freemen*," mentioned in the said last resolution mean persons *possessed* of ancient " burgage houses, within the said borough." *They* also went into evidence to prove that the usage had been agreeable to their position. It appears from the tendency of the evidence produced on both sides, that both *inhabitancy*, and a certain form of admission to freedom, were contended for by the petitioners, and denied to be necessary by the sitting members. The cause was tried at the bar of the House. There was a division on the question, and it passed in the negative, only by a majority of one, 236 to 235. The tellers for the Noes were Sir John Hynde Cotton, and Mr. Lyttleton; for the Yeas, Mr. Secretary at War, and Mr. Fox. It is obvious that this case is liable to the same objections as that of Denbigh, (p. 161.) Neither is it entirely in point to the purpose for which it

was

was cited; for it ſeems that the Houſe admitted evidence of uſage ſubſequent to the laſt determination tending to put a *limited* conſtruction on *general* words uſed in that determination.

P. 160. (C) So far that caſe is in point; but, in the ſame caſe, a few days afterwards, the Houſe reſolved, Dec. 15. "That the word "*populacy*," in the laſt determination, ex- "tends only to the inhabitants, houſekeepers of the ſaid town "and port, paying ſcot and lot." Journ. vol. xxix. p. 90. col. 1. By this reſolution a reſtricted ſenſe was put upon a very general term in a laſt determination.

☞ It may be proper to take notice, that there is a very great error, in the manner in which the reſolution of the 10th of February, 1670 is ſtated in the book of the Law of Elections, p. 307.

P. 162 (D). The word "*obſolete*," in the ſtatute of the 14th of George the Third, cap. 58. ſeems to be taken in its popular ſenſe, and is, perhaps, an expreſſion which ought not to have been uſed in an act of Parliament. It is an eſtabliſhed maxim of the law of England, that no ſtatute can loſe its validity, by mere diſuſe, or *deſuetude*, as it is termed in Scotland; though that diſuſe may have continued for centuries. In the printed editions of the ſtatutes, thoſe acts which have loſt their effect *conſequentially* by the annihilation of the ſubjects on which they could operate, are called *obſolete*; in contradiſtinction to ſuch as are poſitively *repealed* by ſubſequent ſtatutes.

The hiſtory of the ſtatutes of Henry the Fifth, and Henry the Sixth, concerning reſidency, ſeems indeed to favour the notion that, even in England, a law may be abrogated by diſuſe, for there are many inſtances in the Journals where objections drawn from thoſe ſtatutes have been diſregarded or overruled by the Houſe of Commons, and the judges of Weſtminſter-hall ſeem to have paid as little regard to them.

In the caſe of Denzell Onſlow againſt Rapley, bailiff of Haſlemere, (which was an action for a falſe return, tried at the Aſſizes in Surrey, 20 July, 1681, before Sir Francis Pemberton, Chief Juſtice of the King's Bench), "The defendant's "counſel firſt inſiſted on the ſtatute of the 1ſt of Henry the "Fifth, cap. 1. that a perſon elected muſt be free, *reſiant and* "*dwelling* within the borough. To which it was anſwered, "and *reſolved, by the court*; That little or no regard was to "be had to that ancient ſtatute, for as much as the common "practice of the kingdom had been, ever ſince, to the con- "trary; and it was the way to fill the Parliament houſe with "men below the employment; and the objection was diſallow- "ed." See this caſe as reported in a little tract of Lord Somers, firſt publiſhed in 1681, and reprinted in the 4to edition of his State Tracts. Vol. i. p. 374.

But

But there is a caſe in the Journal of the reign of James the Firſt, where Sir Edward Coke puts the neglect of the ſtatutes of reſidency on a more conſtitutional ground. Sir Thomas Beamond and Sir George Haſtings being candidates for Leiceſterſhire, the latter had the majority of voices, but becauſe he was not *reſiant* in the county, Beamond was returned. The matter came before the Houſe 12 Feb. 1620-1. Counſel were heard at the bar; and the ſtatutes of the 1ſt of Henry the Fifth, and of the 8th and 23d of Henry the Sixth, were urged againſt the eligibility of Haſtings. In the debate, Sir Edward Coke treated thoſe ſtatutes as *directory*, not *concluſory*, and ſaid direction was matter of order, which maketh nothing void; and that the meaning of the act was only that ſuch ſhould be choſen as knew the ſtate of the country, and the grievances thereof. Upon the queſtion, it was reſolved; that Beamond was not duly elected, and that Haſtings was; and the *ſheriff* * was ordered to alter the return accordingly. Journ. Vol. i. p. 517, 518.

P. 162. (E). In this caſe of Pembroke, it was contended for the ſitting member, "That the right of election for the "borough of Pembroke, is in the mayor, bailiffs, and bur-"geſſes of the borough of Pembroke and Tenby only." For the petitioners it was alledged, "That it was in the mayor, "bailiffs, and burgeſſes of the ſeveral boroughs of Pembroke, "Tenby, and Wiſton." The point of *reſidency*, therefore, was not in iſſue. The ſtatute of the 35th of Henry the Eighth was only read to prove the right of burgeſſes of the contributory boroughs, to vote at the election for the ſhire-town.

* *Vide ſupra*, Introduction, Note (W), p. 46.

IX.

THE

CASE

Of the BOROUGH of

DORCHESTER,

In the County of DORSET.

The Committee was choſen on Tueſday, the 21ſt of February, and conſiſted of the following Gentlemen.

Frederick Montagu, Eſq. Chairman,	Members for	Higham Ferrers
Sir William Codrington, Bart.		Tewkeſbury
John Dyke Ackland, Eſq.		Callington
William Drake, Eſq.		Agmondeſham
William Drake, Eſq. jun.		Agmondeſham
Richard Aldworth Neville, Eſq.		Grampound
Aſheton Curzon, Eſq.		Clitheroe
Sir Thomas Frankland, Bart.		Thirſke
Sir Harbord Harbord, Bart.		Norwich
Sir George Cornwall, Bart.		Herefordſhire
Sir William Guiſe, Bart.		Glouceſterſhire
Charles Brett, Eſq.		Leſtwithiel
Sir John Moleſworth, Bart.		Cornwall
NOMINEES.		
Lord John Cavendiſh		York
Sir Edward Aſtley, Bart.		Norfolk

PETITIONERS.

Anthony Chapman, Eſq.

Several Inhabitants and Electors of the Borough of Dorcheſter.

Sitting Members.

William Ewer, Eſq. John Damer, Eſq.

COUNSEL.

For the Petitioners.

Mr. Cox, Mr. Lee.

For Mr. Ewer.

Mr. Mansfield, Mr. Rooke.

For Mr. Damer.

Mr. Bearcroft, Mr. Batt.

THE

THE CASE

Of the BOROUGH of DORCHESTER.

ON Wedneſday, the 22d of February, when the Committee met, the two petitions were read.

The firſt ſet forth, *in general*, That the petitioners had a majority of legal votes, and oughto have been returned (1).

The other alledged, *ſpecially*, That divers perſons were admittted to votet who were neither "inhabitants, nor "occupiers of real eſtates within the borough," and had no right (2).

The laſt determination of the right of election, being read, appeared to be as follows:

18 May, 1720. Reſolved, "That the right of electing "burgeſſes, to ſerve in Parliament for the Borough of Dor-"cheſter, in the county of Dorſet, is in the *inhabitants* of "the ſaid borough paying to church and poor, in reſpect "of their perſonal eſtates; and in *ſuch perſons* as pay to "church and poor, in reſpect of their real eſtates within the "ſaid borough (3).

Then the ſtanding order of 1735-6 was read (4).

The numbers on the poll were,

For Ewer — — —	232
For Damer — —	214
For Chapman — —	155

But

(1) Votes, 6 Dec. p. 22.
(2) Votes, 17 Dec. p. 91.
(3) Journ. vol. xix. p. 363. col. 2.
(4) *Supra*, p. 51.

But the counſel for Chapman alledged, That, if they were right in their conſtruction of the determination of the right of election, the numbers of legal votes would be,

For Chapman	—	—	118
For Ewer	—	—	112
For Damer	—	—	112

This ſtate of the votes, upon that ſuppoſition, was not admitted by the counſel for the two ſitting members: however, it was agreed by all the counſel, and the Committee, that the queſtion concerning the conſtruction of the laſt detetermination ſhould be ſeparately argued and determined.

The counſel on the part of the petitioners contended, That the laſt clauſe of the determination means only, "Such "as are *occupiers* of real eſtates within the borough; and, in "reſpect thereof, pay to church and poor."

The counſel for the ſitting members maintained, That it means, "*Owners* of real eſtates within the borough paying "in reſpect thereof to church and poor, whether real eſtates "are in their own *occupation*, or not."

On the part of the petitioners, a witneſs, of the name of Pitman, who remembered the election in 1720, was called to prove that no perſons who were merely *owners*, and were neither *occupiers* of real eſtates, nor inhabitants, voted at that election; but it appeared from his teſtimony that, of a liſt of perſons whom he remembered to have polled at that time, there were ten out-voters, as they are called, or perſons who were merely owners; and the counſel for the ſitting members offered to prove, that ſeveral others had voted on the ſame occaſion; but the Committee ſaid they were ſatisfied, and did not require any farther evidence on that head.

The uſage ſince 1720 was admitted to be in favour of out-voters.

COUNSEL for the petitioners.

When the Houſe of Commons, or the legiſlature, mention, "*paying*," they muſt be conſtrued to mean *legal payment*; as when they ſpeak of a *freehold*, they are underſtood to mean a *legal freehold*. In deciding the queſtion before them in 1720, the Houſe muſt be preſumed to have decided it with a reference to legal rights, authorities, and impoſitions.—The poor rate is a tax upon inhabitants, or *occupiers*, only; as is clear, both from the words of the ſtatute

tute of the 42 of Queen Elizabeth (5), and the conſtruction which has been put upon them in Weſtminſter-hall. Lord Raym. 1280 (A).

That the church-rate is alſo a tax only on inhabitants or occupiers, is proved by a variety of authorities, particularly by Jefferies' Caſe in the 5th part of Coke's Reports, p. 66, and by the 2d part of Rolle's Abridgement, p. 289 and 291, and Gibſon's Codex, p. 220. col. 2. (B).

If the owners of real eſtates in Dorcheſter are *de facto* rated, yet they never can be compelled to pay the rates: They cannot be diſtrained upon for them. The rates in Dorcheſter have always been intituled, "Rates on the ſeve-"ral *occupiers* of land, houſes, &c." In 1772, an attempt was made to alter the words in the title, and to make it run thus, "Rates on the ſeveral *owners*, or occupiers, &c." but, at a veſtry holden for that ſpecial purpoſe, theſe words were reſcinded, by an order which is entered in the veſtry-books, and the cuſtomary title reſtored.

(☞ This was proved by the books, and by a parole evidence.)

This circumſtance ſhows, that it is well known, even in this borough, that mere owners are not liable to be rated to the poor.

The reaſon why the word "*inhabitants*" is uſed in the firſt clauſe of the determination, and "*perſons*" in the ſecond, is this (and it ſhows the Houſe to have formed their deciſion with a view to the legal payment of rates): a perſon may be an *occupier* of land without living on it; and, for land, *occupancy* without *inhabitancy*, ſubjects the perſon occupying to the rates both for the poor and the church (B).

COUNSEL for the ſitting members.

The reſolution in 1720 does not mention perſons *rated* or *rateable*, but perſons *paying* to church and poor; that is, thoſe who, *in fact*, do pay. The Houſe had then in contemplation the uſage of the place, and not the ſtatute of queen Elizabeth. In Dorcheſter, as in moſt places of the Weſt of England, the eſtabliſhed uſage is, that the owner pays the poor rate; and in other parts of the kingdom, when there is reaſon to apprehend that the occupier is in danger of becoming

(5) 43 Eliz. cap. 2.

becoming chargeable to the pariſh, they frequently rate the owner, to prevent ſuch occupier from gaining a ſettlement. If the owner pay, and neither he nor the pariſh complain, the payment is *legal* as againſt all ſtrangers. If the owner is rated, and ſubmit, without appealing within the time allowed for that purpoſe by act of Parliament (6), he cannot afterwards ſet aſide the rate, to recover from the pariſh the money he may have paid. In truth, the rate in all caſes is ultimately paid by the owners; for when the tenant pays it in the firſt inſtance, there is a proportionable diminution of the rent he pays to his landlord.

As to the church-rate, the canoniſts are much divided about it, and different perſons are holden to be liable according to the purpoſes for which it is impoſed, either of ſupporting the edifice, or of ſupplying it with bells, plate, and other ornaments (C).

Dorcheſter is a borough by preſcription, and the determination of 1720 muſt be conſidered as a *declaration* of the preſcriptive right of election. It ought not therefore to be interpreted with any reference to the ſtatute of Queen Elizabeth; there were pariſh payments to the poor before that ſtatute; and it cannot be ſhewn, that owners were not, as well as occupiers, liable to thoſe payments.

If the Houſe had meant to declare the right of election to be as the counſel for the petitioners contend, they would have uſed the ſame language as they have done in other caſes, where the right is conformable to their poſition; and, inſtead of expreſſing themſelves as they have done, they would have decided, "That the right of voting is in the *inhabitants paying ſcot and lot.*"

Houſes are the only real eſtates in the borough of Dorcheſter for which votes are claimed; the *occupiers* of thoſe houſes *muſt* be *inhabitants*; therefore, if the Houſe had meant to ſay, that the right of voting for real property in this borough, is only in thoſe who are in the actual occupation of that property, would not "*inhabitants*" have been the word uſed for both claſſes of voters?

The beſt rule for the conſtruction of any determination of the Houſe, where the ſenſe is ſuppoſed to be *doubtful*, is, to compare it with the antecedent uſage, the circumſtances of the particular caſe which gave an occaſion to it, and the ſubſequent uſage.

It

(6) 17 Geo. II. cap. 38. § 4.

It appears, by a petition from this borough in 1690, 3 April, that perſons, who were not inhabitants, had voted at two or three elections previous to that time; and if we conſider the infrequency of Parliaments in James the Second's reign, and at the end of Charles the Second's, and their duration at the beginning of that of the latter, we ſhall find that this will carry the uſage at leaſt up to the Reſtoration.

It has been proved by a witneſs, called to eſtabliſh the contrary (7), that ten perſons, not inhabitants or occupiers, polled in 1720, at the election which gave occaſion to the determination in queſtion, and a great many more might have been ſhewn to have voted at the ſame time. Mr. Speke, one of the five people who ſigned the petition of the electors that year, is one of thoſe out voters whom the witneſs, produced on the part of the petitioners, remembers to have polled.

The petition ſet forth, "That the right of election is, and, "beyond the memory of man, has been, in the inhabitants "paying to church and poor in reſpect of their perſonal "eſtates, and *in all perſons* paying to church and poor for, "or in reſpect of, any real eſtates *they are ſeiſed or poſſeſſed* "*of* within the ſaid borough."

Now theſe are almoſt the very words of the determination; the ſenſe, as to the diſtinction between ownerſhip and occupation, is exactly the ſame; to deny this, is to ſuppoſe that Mr. Speke, as an elector, would have petitioned the Houſe of Commons in ſupport of a right of election, by which it would appear that he himſelf had no title to vote,—nor to petition, as not being a party at all concerned in the cauſe.

The uſage ſince 1720 is unqueſtionable, and unqueſtioned.

If the Committee were to give their aſſent to all the doctrine of the counſel for the petitioners on the ſubject of the legal payment of rates, ſtill, as it follows, as well from the circumſtances of the caſe in 1720, and the previous and ſubſequent uſage, as from the obvious ſenſe of the words of the laſt determination, that the Houſe could not have that doctrine in contemplation when the determination was made, but, on the contrary, muſt have meant to deſcribe owners of real eſtates who were *de facto* payers of the rates, the deciſion of the point now in litigation muſt be contended for on the part of the ſitting members. In the late caſe of New

(7) *Supra*, p. 169.

New Radnor, the counſel on one ſide contended, with great appearance of reaſon, that the conſtruction which thoſe on the other ſide put upon the laſt determination was contrary to a poſitive act of Parliament; but antecedent and ſubſequent uſage, and the plain ſenſe of the words, being in favour of that conſtruction, the Committee adopted it in deciding the cauſe.

The counſel having cloſed their arguments on the meaning of the laſt determination, the Committee cleared the court, and deliberated among themſelves. After which, the counſel being called in, the Chairman informed them that the Committee had come to the following reſolution:

Reſolved, "That it is the opinion of this Committee "that, purſuant to the laſt determination of the Houſe of "Commons, ſuch perſons as pay to church and poor in re"ſpect of their real eſtates within the borough of Dorcheſ"ter, in the county of Dorſet, though not inhabitants, or "occupiers, were entitled to vote at the laſt election of "burgeſſes to ſerve in Parliament for the ſaid borough."

The counſel for the petitioners, on being informed of this reſolution, ſaid they were inſtructed not to give the Committee any further trouble.

In the courſe of the cauſe, the following queſtions of evidence aroſe.

The counſel for the ſitting members called one of the preſent overſeers of the poor for Dorcheſter, who offered to produce the pariſh books in which the rates of ſeveral years were entered, together with the ſums of money collected.

This was objected to.—It was ſaid, that the original rates were better evidence, and, as they might be procured, the book ought not to be received.

On the other hand, it was ſaid, that all the pariſh officers had been ſerved with notices to produce the original rates, but that it appeared that thoſe originals could not be found, and that this was not extraordinary, ſince the rates are generally made on detached pieces of paper, and, for the moſt part, loſt or deſtroyed after they have been tranſcribed into a book (8).

The Committee over-ruled the objection.

When Pitman (9) was called to prove that no out-voters had polled in 1720, he acknowledged that he was an *inhabitant* having a right to vote in reſpect of his perſonal eſtate.

The

(8) 17 Geo. II. cap. 38. § 13. (9) P. 169.

The counſel for the ſitting members inſiſted, That his evidence on the right of election was inadmiſſible; That he was an intereſted witneſs, and muſt be inclined to have the out-voters excluded, which would diminiſh the number of electors, and, thereby, enhance the value of the votes which remained.

It was anſwered, That a vote was not like certain other rights, as a right of common, whoſe value is diminiſhed by encreaſing the number of thoſe who have a concurrent title; That with regard to ſuch rights, the objection now made would be good, as the teſtimony of the witneſs might affect the pecuniary value of his own eſtate; but that a vote, in the eye of the law, has no value analagous to thoſe rights which are ſaleable property; That the vote of an individual is not ſuppoſed to ſink in his value, by an encreaſe of the number of other electors; and that the conſtant practice had been to admit a voter, under an undiſputed title, to give evidence of the right of election (D).

The Committee over-ruled this objection.

On Thurſday, the 23d of February, the Committee, by their Chairman, informed the Houſe, that they had determined,

That the two ſitting members were duly elected (1).

(1) Votes. p. 265.

NOTES

NOTES

ON THE CASE OF

DORCHESTER.

PAGE 170. (A). The churchwardens and overſeers of the poor of every pariſh, or the greater part of them, ſhall "raiſe "weekly, or otherwiſe, by taxation of every *inhabitant*, par- "ſon, vicar and other, and of every *occupier* of lands, houſes, "tithes impropriate, propriations of tithes, coal-mines, or "ſaleable underwoods in the ſaid pariſh," competent ſums for the neceſſary relief, &c. 43 Eliz. cap. 2. § 1.

"The farmer and *occupier* ſhall pay this tax, and not the "landlord. Lord Raym. 1280.——And the reaſon why the "occupier is to be ſo charged, is, that the poor-rate is not a "charge upon the land, but upon the occupier in reſpect of "the land." Fitzgibb. 297.

P. 170. (B) In Jefferies' caſe, the court of King's Bench, after having taken the opinion of ſeveral canoniſts, determined, "That a tax for repairing the church is payable by an *occu-* "*pier* of lands in the pariſh, though he do not inhabit upon "them, nor in the pariſh; that he is, to that effect, a pa- "riſhioner; but that, when there is a farmer inhabits upon "the lands, the leſſor who receives the rent ſhall not be charg- "ed; and, that a church-rate is on the perſon, but in reſpect "of the land." 5 Co. f. 67. b.——In 2 Rolle's Abr. p. 289. and in Gibſon's Codex, vol. i. p. 220. col. 2. the ſame doctrine is laid down, and Jefferies' caſe cited.

P. 171. (C). "For the ornaments of a church only the "*inhabitants* are to be rated; and that in reſpect, not of their "lands, but of their perſonal eſtate. Therefore the man "who occupies land in one pariſh, and lives in another, is "not rateable for the ornaments of the church in the firſt." 2 Roll. Abridg. p. 291. "A rate for the reparation of the "fabrick of a church is real, charging the land, and not the "perſon; but a rate for ornaments is perſonal upon the "goods, and not upon the land." Gibſon's *loc. cit.* It ap- pears from Gibſon that this has been determined in a va- riety

riety of caſes.——" Under ornament are comprehended ſeats " in a church, and bells; and to be rateable for them " inhabitancy is neceſſary, and not merely occupancy." *Ibid.*

P. 174. (D). It appeared that Pitman had alſo a right to vote as the *owner* of a real eſtate. Therefore, ſince he had two titles, and although a change of ſituation ſhould afterwards annul one, would ſtill, if both ſhould be confirmed by the Committee, continue to enjoy the other, it could not be his intereſt to overthrow either.

(X.)

THE

CASE

Of the BOROUGH of

TAUNTON,

In the County of SOMERSET.

The Committee was choſen on Friday, the 24th of February, and conſiſted of the following Gentlemen.

Frederic Montagu, Eſq. Chairman,	Members for	Higham Ferr.
Sir James Pennyman, Bart.		Beverley
Abel Smith, Eſq.		Aldb. Yorkſh.
Herbert Mackworth, Eſq.		Cardiff
Hon. Charles Marſham,		Kent
Sir Watkin Williams Wynn, Bart.		Denbighſhire
Beaumont Hotham, Eſq.		Wigan
Sir Henry Bridgeman, Bart.		Wenlock
Francis Anneſley, Eſq.		Reading
Sir William Bagot, Bart.		Staffordſhire
Chriſtopher Griffith, Eſq.		Berkſhire
Jacob Wilkinſon, Eſq.		Berwick
Anthony James Keck, Eſq.		Newton, Lan.
NOMINEES. *Of the Petitioners.*		
Hon. Thomas Howard,		St. Michael
Of the Sitting Members.		
Viſcount Liſburne.		Cardiganſhire

PETITIONERS.

Alexander Popham, Eſq. and John Halliday, Eſq.
Several Inhabitants and Electors of the Borough of Taunton.

Sitting Members.

The Hon. Edward Stratford, Nathaniel Webb, Eſq.

COUNSEL.

For the Petitioners.

Mr. Lee, Mr. Morris.

For the Sitting Members.

Mr. Gould, Mr. Hotchkin.

THE CASE

Of the BOROUGH of TAUNTON.

ON Saturday, the 25th of February, the Committee being met, the two petitions were read, ſetting forth;

That the mayor, as returning officer, had procured himſelf to be appointed mayor, to anſwer election purpoſes, and had, by unneceſſary adjournments, protracted the poll from the 10th of October, when it began, to the 18th; and that he had rejected many legal votes which were tendered for the petitioners Popham and Halliday, and admitted many illegal votes for the ſitting members;

That the petitioners were duly elected by a great majority of legal votes, and ought to have been returned;

That the ſitting members previous to, and during, the election, were guilty of bribery and corruption, by themſelves and agents (1).

It was admitted, by the counſel for the petitioners, that the mayor was *legally* elected; but a great deal of evidence was gone into, to ſhew that he was not advanced to the mayoralty in regular rotation, but had got into the office for the purpoſe of promoting the intereſt of the ſitting members, and had acted as the petitions ſtated, at the election.

After a conſiderable time had been ſpent in hearing this ſort of evidence; the Chairman, by the direction of the Committee, aſked the counſel, whether they wiſhed to lay ſuch a charge againſt the returning officer as might induce

(1) Votes, 6 Dec. 1774, p. 22, 23.

induce the Committee to report *ſpecially* againſt him; or whether they intended to affect the numbers on the poll, by any undue act or acts of the returning officer. The anſwer to both queſtions was in the negative. They ſaid, they only meant to give a general idea of his partiality. Upon this, the Chairman, by order of the Committee, directed them to proceed to the next point in the caſe. The Committee, therefore, neither acquitted nor condemned the returning officer, but were of opinion, that the enquiry into his conduct was not neceſſary to the deceſion of the merits of the election, and conſequently waved ſuch enquiry.

The laſt determination of the right of election in Taunton is in the following words:

28 July 1715. Reſolved, "That the right of elec-"tion of burgeſſes to ſerve in Parliament for the bo-"rough of Taunton, in the county of Somerſet, is in "the *inhabitants* within the ſaid borough, being *pot-wal-*"*lers*, and not receiving *alms* or *charity* (2).

When this reſolution was moved, an amendment was propoſed to the queſtion, by leaving out the words, "*or* "*charity*;" and the queſtion being put that the words "*or* "*charity*" do ſtand part of the queſtion; it was reſolved in the affirmative; and then the main queſtion was put, and was reſolved in the affirmative (3). This proves that, in the borough of Taunton, there is a clear diſtinction between *alms* and *charity*, which was admitted by the counſel on both ſides. "*Alms*" means parochial collection, or pariſh relief. "Charity" ſignifies ſums ariſing from the revenue of certain ſpecific funds which have been eſtabliſhed or bequeathed for the purpoſe of aſſiſting the poor. There are a great many of thoſe funds in Taunton, called the Town-charity, Meredith's charity, Saunders's charity, &c.

It was agreed, on both ſides, that neither alms, nor charity, diſqualify an elector in Taunton, unleſs they have been received within a year before the election. On the 27th of Auguſt, 1715, (on occaſion of the petition which gave riſe to the determination of the right of election) the queſtion being put, "That the counſel for the

(2) Journ. vol. xviii. p. 241. col. 2.
(3) Journ. *loc. cit.*

" ſitting member be admitted to give evidence of per-
" ſons having received Saunders's charity before the 2d of
" February, 1713-4, (which was exactly a year before
" the election);" It paſſed in the negative (4).

It was agreed, That a *pot-waller* is a perſon who furniſhes his own diet, whether he be a houſeholder, or only a lodger.

And it was agreed, That to be a pot-waller qualified to vote in Taunton, it has always been underſtood, both before and ſince the determination in 1715, that ſuch perſon muſt have a legal parochial ſettlement in the borough. The counſel for the ſitting members thought, that gentlemen of fortune were excepted out of this rule, but there does not ſeem to be any principle on which a diſtinction can be ſupported.

The counſel for the petitioners ſaid, That the Journals of the Houſe have recognized that *apprentices* cannot be pot-wallers qualified to vote. *Quær.*

The numbers on the poll, as produced by the returning officer, were as follow:

For Webb	260
For Stratford	254
For Halliday	202
For Popham	201

The counſel for the petitioners propoſed to diſqualify of the voters for the ſitting members,

114. As having received the town charity.
2. As having received the church warden's charity.
3. As Chelſea penſioners.
19. As not having ſettlements in Taunton.
15, or 16. As not anſwering the definition of Pot-wallers.
2, or 3. As certificate-men.
2. As apprentices.
2. As bribery agents.

If they ſucceeded in this, they ſaid there would remain a clear majority for the petitioners, but that at all events, for they did not foreſee what objections there might be to their own votes, they would prove the charge of bribery ſo directly and palpably, as to diſqualify the ſitting members, and to make the election void as to them (5).

In

(4) Journ. vol. xviii. p. 286. col. 2.
(5) See the Caſe of St. Ives, *infra*, Note (B)

In the courſe of the cauſe it was ſettled that Chelſea penſioners might vote.

Poſterior to the determination in 1715, in the progreſs of the ſame cauſe, it was made an objection to certain voters, that they were certificate-men. From this circumſtance, the counſel for Mr. Halliday and Mr. Popham inferred, That it was underſtood at that time, that ſuch perſons were not entitled to vote; and, after ſome argument, it was agreed by the counſel for the ſitting member that, by the *lox loci*, certificate-men cannot vote for this borough.

The counſel for the ſitting members endeavoured to prove fraud in the diſtribution of the charities, with a view to election purpoſes; and they brought witneſſes to impeach the credit of thoſe who had given poſitive evidence of bribery, by the agents for the ſitting members.

On their part they propoſed to diſqualify of the votes for the petitioners,

2. On account of the town-charity, and Meredith's charity.

1. As having received alms and the town charity.

7. On account of the town-charity, and having no ſettlement.

3. As having received the town-charity; though their names were not entered in the conſtable's book, who is the perſon appointed to diſtribute that charity.

1. As being the turnpike-man. *Quær.*

7. As having no ſettlement.

7. As not anſwering the definition of Pot-wallers.

3. As certificate-men,

They alſo endeavoured to prove bribery on the petitioners.

☞ I only heard the openings of the counſel on each ſide (6). The cauſe laſted from the 24th of February to the 16th of March.

On Thurſday, the 16th of March, the Committee, by their Chairman, informed the Houſe that they had determined,

That John Halliday, Eſq; and Alexander Popham, Eſq; were duly elected, and ought to have been returned (7).

(6) *Vide ſupra*, p. 20.
(7) Votes, p. 379, 380.

THE

XI.

THE

CASE

Of the BOROUGH of

PONTEFRACT,

In the County of YORK.

The Committee was choſen on Tueſday, the 28th of February, and conſiſted of the following Gentlemen.

Lord Charles Spencer, Chairman,	Members for	Oxfordſhire
Lord Advocate of Scotland, -		Peebleſhire
Edward Southwell, Eſq. - -		Glouceſterſhire
Thomas George Skipwith, Eſq.		Warwickſhire
Paul Methuen, Eſq. - -		Bedwin
John Smith, Eſq. - -		Bath
Charles Anderſon Pelham, Eſq-		Lincolnſhire
Sollicitor General of Scotland, -		Edinburghſhire
William Adam, Eſq. - -		Gatton
Charles Penruddocke, Eſq. -		Wiltſhire
John Scudamore, Eſq. - -		Hereford
William Egerton, Eſq. -		Brackley
Sir Roger Moſtyn, Bart. - -		Flintſhire
NOMINEES.		
Of the Petitioners.		
George Johnſtone, Eſq. - -		Appleby
Of the Sitting Members.		
Lord George Germaine, - -		Eaſt Grinſtead

PETITIONERS.

The Hon. Charles James Fox; and James Hare, Eſq. Several Inhabitants, Houſeholders, and Electors of the Borough of Pontefract.

Sitting Members.

Sir John Goodricke, Bart. Charles Melliſh, Eſq.

COUNSEL.

For the Petitioners.

Mr. Lee, Mr. Alleyne.

For the Sitting Members.

Mr. Mansfield, Mr. Bearcroft.

THE

THE CASE

Of the BOROUGH of PONTEFRACT.

ON Wedneſday, the firſt of March, when the Committee met, the two petitions were read (1), and it appeared, that the only queſtion in the caſe was concerning the right of election in the borough of Pontefract: Whether a reſolution of 1624, or one of 1770, was to be conſidered as the laſt determination in the Houſe of Commons, within the meaning of the ſtatute of George the Second.

If the firſt was that determination, Mr. Fox and Mr. Hare had an unqueſtionable majority, and were duly elected; and *vice verſa*.

On the opening of the cauſe, it became a matter of diſpute among the counſel, whether any, or which, of thoſe two reſolutions ſhould be read, before the argument ſhould be gone into concerning them. If one of them were read, it was ſaid, that the ſtanding order of 1735-6 might be then thought to attach upon it, ſo as to bar the counſel from giving evidence to contradict it.

The Committee agreed that both ſhould be read.

The counſel for the ſitting members alledging that they doubted how far the entry of 1624 in the printed Journals was a true copy: the Committee reſolved, that the original ſhould be ſent for.—But, on examination, it appeared that the writing could not be read but with great difficulty (A). On which it was agreed that the reſolution ſhould be read from the printed copy, and that, if either of the parties ſhould

(1) Votes, 6 Dec. p. 24, 25.

ſhould object to any part of it, reference ſhould then be made to the original.

There are two Journals of that period.

In the firſt, (intituled "Originals of the ſeſſions of Parliament, holden at Weſtminſter, 19 *Februarii*, 21 *Jacobi*") (2) there is the following entry:

28 May, 1624. "Mr. Glanvyle reporteth,

"For Pomfrett, two points: 1. Who the electors—— "*Reſolved by the Committee, there being no charter, nor preſcription, for choice, the election is to be made by the inhabitants, houſeholders, reſiants.*—Reſolved alſo ſo now, upon "the queſtion.—

"2, That the Committee alſo of opinion, in reſpect the "poll demanded, though interrupted by Beamont, yet the "poll not being purſued, the choice of Sir Jo. Jackſon void, "and a new warrant to iſſue for a new choice (3)."——

In the other, (intituled, "*Prima ſeſſio Parliamenti inchoat. "apud Weſtm. decimo nono die Februarii, anno regni regis Jacobi, Angliæ, &c. viceſimo primo, et Scotiæ, quinquageſimo "ſeptimo*) (4)," there is the following account of the ſame report:

28 May, 1624. "Mr. Glanvill reports from the Com"mittee of privileges:

"Concerning Pomfret.—Queſtion of Sir John Jackſon. "—Committee reſolved, all the inhabitants, houſeholders, "ought to have voice. 2. Committee reſolved, upon the "latter writ no burgeſs duly choſen; but a new writ to go.

"*Reſolved, That the election ought to be, in Pomfret, by the "inhabitants, houſeholders, reſiants there.*

"Reſolved, That neither Sir Jo. Jackſon, nor Sir Rich. "Beomont, are duly elected; and that a new writ ſhall "go out, for a new election (5)."

The reſolution of 1770, is as follows:

6 February, 1770. Reſolved, "That the right of elec"tion for members to ſerve in Parliament for the borough "of Pontefract, in the county of York, is in perſons hav-

"ing

(2) Journ. vol. i. p. 760.

(3) Journ. vol. i. p. 714. col. 2.

(4) Journ. vol. i. p. 715.

(5) (Theſe two by the Houſe, in conſequence of the report of the Committee.) Journ. vol. i. p. 797. col. 2. p. 798.

" ing within the ſaid borough a freehold of burgage tenure,
" paying a burgage rent (6)."

COUNSEL for the petitioners.

If the reſolution of 1624 was the *laſt determination* of the Houſe in 1729, when the ſtatute of George the Second paſſed (7), no ſubſequent act of the Houſe can annul it: for that ſtatute is binding on the Houſe of Commons, and every laſt determination is to be conſidered as incorporated with, and making part of, the ſtatute, as much as if it were there recited.

It cannot be ſaid that it is only binding on returning officers. The act of the 7th and 8th of William the Third (8) had already made the laſt determination of the Houſe concluſive as to them; and we can never ſuppoſe that the legiſlature inſerted a new clauſe in a ſubſequent law for exactly the ſame purpoſe. The hiſtory of the fourth ſection of the ſtatute of George the Second is to be found in the debates of 1735-6, when the ſtanding order of that year was made. On that occaſion it appears that there were ſome people who, thinking all reſtraint on the ſovereign power of the Houſe of Commons in election matters a great inconvenience, oppoſed the ſtanding order, and endeavoured to explain the ſtatute ſo as to make it nothing more than a reenactment of the 7th and 8th of William the Third. Sir William Yonge was one of thoſe. In anſwer to a ſpeech of his on the ſubject, Sir Joſeph Jekyl told the Houſe, " That
" he was a member of Parliament when the act of George
" the Second paſſed; That this clauſe was not in it when
" it went up to the Houſe of Lords, but was inſert-
" ed as an amendment there; not indeed with any
" friendly view to the bill, but, on the contrary, in the
" hopes of its being thrown out on that account in the lower
" Houſe; thoſe who propoſed the amendment imagining
" that the Commons would not conſent to ſuch a reſtraint
" *upon themſelves*; That, however, the majority of the
" Houſe then thought it a reaſonable and a neceſſary *reſtraint*,
" in order to prevent, in time to come, that frequent con-
" tradiction

(6) Journ. vol. xxxii. p. 665. col. 2.
(7) Geo. II. cap. 24. § 4.
(8) Cap. 7. § 1.

" tradiction in their determinations with reſpect to elec-
" ons, which had, in time paſt, greatly contributed to the
" giving people a contemptible opinion of all the proceed-
" ings of the Houſe (9)."

The meaning and effect of the ſtatute of George the Second being ſo evident, it remains only to ſhew, that the reſolution of 1624 was a determination of the right of election, and that there was no poſterior determination in the Houſe from that time, till 1729, when the ſtatute took place.

That reſolution was a clear determination of the right of election. The account given of it by Glanville, the Chairman of the Committee who tried the cauſe, correſponds perfectly with the entries which have been read from the Journals (1). Both thoſe entries are, in ſubſtance, entirely conſonant to each other, and they are both authentic; for the firſt was written by the clerk of the Houſe, and the other by his ſon, who, on account of the father's indiſpoſition, was appointed to aſſiſt him in keeping the Journals, and was paid by the Houſe (2).

The queſtion of the right of election was directly before the Committee and the Houſe; if that be neceſſary to bring the determination within the ſtatute.—Sir Richard Beaumond pretended that the right was in the freeholders of the borough *only* (3) (B).

It was highly proper for the Houſe to aſcertain the right at that time, as, from the reign of Edward the Firſt till 1621, there had been no election for this borough (4) (C).

The Committee, and the Houſe, determined the right on the general principle of law, not to ſerve any particular purpoſe in this borough, which has been too often the motive in other caſes, where, notwithſtanding, the deciſion is final, and not to be queſtioned. The general principle, " That where there is no charter or preſcription to the con-
" trary, all the inhabitants, houſeholders, reſiants, ought to
" have voices," had been recognized by the ſame Committee

(9) Commons Deb. vol. ix. p. 96, 97.
(1) P. 133.
(2) Journ. vol. i. p. 798, col. 2.——29 May, 1624.
(3) Glanv. p. 142.
(4) Glanv. p. 140. Journ. vol. i. p. 572.—26 March, 1621-2, p. 576.—27 Mar.

tee in the caſes of Dover (5), and of Cirenceſter 6); and though there were controverted elections for Cirenceſter in 1690 (7), and in 1709 (8), the right of election, as determined on the general principle in 1624, was never diſputed or denied.

If the reſolution in 1624 was a clear determination of the right of election, it will be eaſy to ſhow, that from that time till the ſtatute of George the Second took effect, there had been nothing done by the Houſe of Commons to abrogate or overturn it.

In 1660, there was a treble return for Pontefract, but the right of election does not ſeem to have been in litigation; and the Committee (16th May) having reported *generally*, that Sir George Saville, Baronet, and William Lowther, Eſq; had the greateſt number of voices, and ought to ſit, the Houſe came to a reſolution that they were duly elected, and ſhould ſit; and ordered that the clerk of the crown ſhould take the other two returns off the file (9).

1695, 29th November, a petition was preſented to the Houſe, complaining of an undue election (1), on the part of Sir John Bland, which was referred to the Committee of privileges and elections; but on the 10th of February following it was withdrawn (2),

1699-1700, 17th January, "Sir Rowland Gwyn, reported from the Committee of privileges and elections, on the petition (3) of Robert Monckton, Eſq; complaining of an undue election and return of John Bright, Eſq; to ſerve for the borough of Pontefract, "That the right "of election was *agreed* to be in ſuch perſons as have "an inheritance or freehold of burgage tenure within the "ſaid borough (4)."

1699-

(5) Glanv. p. 63.
(6) Glanv. p. 107. Journ. vol. i. p. 708. col. 1. 21 May, 1624
(7) Journ. vol. x. p. 461. col. 1.
(8) Journ. vol. xvi. p. 235. col. 1.
(9) Journ. vol. viii. p. 33. col. 1.
(1) Journ. vol. xi. p. 341. col. 2.
(2) Journ. vol. xi. p. 356. col. 1.
(3) Firſt preſented 16th Dec. 1698. Journ. vol. xii p. 356. col. 1.
(4) Journ. vol. xiii. p. 126. col. 2.

1699-1700, 14th February, a new petition was preſented in favour of Mr. Monckton, and againſt Mr. Bright, who had been returned again on a new election, the former having been ſet aſide in the Houſe (5). Before this petition came to be tried in the Committee of privileges and elections (6) the Parliament was diſſolved (7).

Laſtly; 1715-16, 22 March, Mr. Hampden reported from the Committee of privileges and elections, on the petitions of Sir William Lowther, Baronet, and Hugh Bethel, Eſq; and of certain burgeſſes of Pontefract (8), "That it "was *agreed*, That this was a borough by preſcription; "and that the right of election is in perſons having a "freehold of burgage tenure, paying a burgage rent."

From this complete deduction of all the proceedings in the Houſe, between 1624 and 1729, relating to elections for this borough, it is evident that during that interval, there was no reſolution, no determination of the Houſe on the right; nothing but *agreements* of parties; and neither the agreement of parties (9), nor even the reſolution of a Committee, unleſs ratified by the Houſe, can alter the law of elections.

The reſolution of 1624, therefore, was the laſt determination in the Houſe of Commons of the right of election for Pontefract, at the time when the ſtatute of George the Second took place; and conſequently became, by the operation of the ſtatute, final to all intents and purpoſes; and cannot be altered or annulled by any thing which the Houſe either has done, or can do, ſubſequent to that ſtatute (D).

COUNSEL for the ſitting members.

The reſolution of 1770 is concluſive.

Though the *laſt determination* is binding on the Houſe of Commons, yet, where a doubt ariſes whether there is a laſt determination, the Houſe is the only court competent to try that queſtion, and decide upon it; and, in 1770, the Houſe did decide that what appears on the Journals of 1724 is not a laſt determination within the meaning of the act of

(5) Journ. vol. xiii. p. 209. col. 1.

(6) Journ. ſame vol. p. 225. col. 1. 244. c. 1, 2.

(7) 19 Dec. 1700, ſame vol. p. 322, 323.

(8) Journ. vol. xviii. p. 369. col. 2. p. 405. col. 2. p. 409. col. 2.

(9) Caſe of Cirenceſter, 21 May 1624, cited in the caſe of Briſtol, p. 131.

of George the Second; for they refuſed to let it be read as ſuch, upon a diviſion of 161 to 32.

Would not a returning officer be bound to follow the reſolution of 1770? It is the laſt determination, in point of time; and could he take upon him to queſtion its validity, or to turn over the Journals, and fix upon ſomething elſe as the laſt determination? If he could not, ſhall there be one laſt determination for returning officers, and another for this Committee?

It ſeems to be admitted, by the counſel on the other ſide, that if there was no determination before the year 1729, then the firſt after that epoch ſhall be the final determination within the meaning of the ſtatute. This Committee has a power co-extenſive with what the Houſe of Commons formerly had; but it is not a court of appeal from former deciſions of the Houſe; and the court competent to the queſtion having determined that the right of election for Pontefract was not *finally* ſettled till 1770, the Committee cannot controvert the judgment.

If the Committee, however, ſhould not think themſelves precluded from going into the proceedings in 1624, a fair examination of the account given in the Journals of thoſe proceedings, will demonſtrate that what the counſel for the petitioners affect to treat as a laſt determination, cannot be conſidered as ſuch.

One of them ſeems to admit, That there cannot be a determination within the meaning of the act of Parliament, unleſs where the right of election is litigated, and the parties are directly at iſſue upon it. This, indeed, muſt have been the reaſon which induced the legiſlature to uſe the word "*determination*," borrowed from Weſtminſter-hall, inſtead of "*reſolution*," the common technical word in the Houſe of Commons. But it is evident, both from the Journals, and Glanville himſelf, that, in 1624, the right of election was not a neceſſary queſtion in the cauſe. The true and only point was, whether the election ſhould be void, the poll having been improperly ſtopped. If the Committee or the Houſe decided upon any thing elſe, the deciſion was extra-judicial. It was a mere ſpeculative opinion of the Committee "That, in boroughs where there is no charter or preſcripti-" on for choice, the right is in the inhabitants." The principles of the major part of thoſe who compoſed that Committee

mittee are well known. They were diſpoſed to ſeize all opportunities of rendering every part of the conſtitution as popular as they could. But on the ſpeculative doctrine, the beſt antiquarians and lawyers are of a contrary opinion. It appears, from Dr. Brady, and other writers on the ſubject, that the right of election in all boroughs was anciently only in the tenants of burgage tenure. Lord Chief Juſtice Holt, in the caſe of Aſhby and White, ſays, "That it is part of "the conſtitution of England, that burgage tenure bo-"roughs ſhall elect members to ſerve in Parliament, and "that, in that caſe, the right of election is a privilege an-"nexed to the burgage land, and is a real privilege (1)." If it be ſaid, that that opinion was delivered *obiter* by him, ſtill it is of equal weight with a ſpeculative tenet of ſerjeant Glanville, or of any other member of the Committee of 1624.

The reſolution, as ſtated in Glanville's Reports, is merely hypothetical. It proceeds on the ſuppoſition that there is no charter of incorporation to this borough of an earlier date than the 4th of Henry the Fourth. But there are charters of much earlier date. One of the 5th of Richard the Firſt, from Roger de Laſci, conſtable of Cheſter, and lord of the caſtle and borough of Pontefract, who thereby, among other privileges, "grants and *confirms* to his *burgeſſes* "of Pomfret, and their heirs and ſucceſſors, liberty and "*free burgage*, and their toſts to be held of him and his "heirs in fee, paying 12d, for each whole toft, as in the "time of Henry de Laſci, (2);" and this carries the conſtitution of the borough beyond the time of legal memory. Another of the 6th of Edward the firſt from Henry de Laſci, earl of Lincoln confirms the former. Theſe charters prove the hypotheſis of the Committee to have been falſe; and, if ſo, the concluſion, although no other objection lay to it, muſt fall to the ground.

All the returns ſince 1624, ſhow that the reſolution of that year was never thought to be deciſive of the right of election. There is one bearing date only three years afterwards, which is in the names of the *major*, *comburgenſes* (now called aldermen) and *burgenſes*, without a word about *inhabitants*. From 1627 to 1699, except in one inſtance, they all run in the ſame manner. In that inſtance, and in every inſtance ſince 1699, the word "*combnrgenſes*" is left out, and the indentures

(1) 6 Mod. 51, 52. Lord Raym. 951. Salk. 18. 20. 3.
(2) This was given in evidence.

dentures of return purport (3) to be between the mayor and burgeſſes, but ſtill not a word of *inhabitants*. It cannot be pretended that this was merely the corporate name, for the form is not "Indenture between the mayor, aldermen, and "burgeſſes of Pontefract." But indenture between A. *ma-* "*jor*, B, C, D, &c. *comburgenſes*, E, F, G, H, &c. *bur-* "*genſes*," ſo that thoſe words are deſcriptive of the particular perſons who voted at the different elections.

The agreements in 1699 and 1715, if they did not decide the right, are, at leaſt, ſtrong evidence to ſhew what the right was always underſtood to be, and that it was never thought that it had been decided in 1624.

But the bare inſpection of the two entries of that tranſaction in the manuſcript Journals is ſufficient to ſatisfy the Committee, that in thoſe looſe and inaccurate minutes, taken by two different perſons, and in many things varying materially from each other, there is nothing like that ſort of determination which the legiſlature meant to ſpeak of in the ſtatute of George the Second.

About the year 1742, the project of printing the Journals was ſet on foot, and Mr. Hardinge, then clerk of the Houſe, a man of great learning and accuracy, was appointed to examine the originals, and report his obſervations to the Houſe.—In his report, he ſays, "The Journals of the reign "of King James the Firſt (being for the moſt part minutes "taken by the clerk, and not afterwards tranſcribed) are "in many places incorrect and almoſt illegible, and are "alſo much impaired by length of time and various acci- "dents. Yet as they contain the hiſtory of many impor- "tant tranſactions, and alſo the heads of ſpeeches delivered "by many famous members in debates concerning the pre- "rogative of the crown, and the liberty of the ſubject, &c. "they ſeem worthy of very great regard."

This report of Mr. Hardinge was ſubſequent to the ſtatute of George the Second. Is it to be ſuppoſed, that if he had thought there was any thing in the Journals of James the Firſt's reign, deciſive of the rights of election, he would have overlooked, in his report to the Houſe, a reaſon for preſerving them much more weighty than what he ſpecified?

Glanville

(3) The returns were produced and read.

Glanville gives a fuller account of the proceeding in 1624 than either of the entries in the Journals, yet he does not ſay that the Houſe adopted the opinion of the Committee concerning the right of election. On the contrary, after ſtating *that*, among ſeveral other propoſitions, as having been agreed upon by the Committee, he adds, "In concluſion, the "Committee were of opinion, that a warrant ought to go "forth for a new writ, the former election being void; *which* "being ſo reported to the Houſe, was there reſolved and *or*-"*dered* accordingly." That is, it being reported that the Committee thought the election void, the Houſe reſolved that it was ſo, and ordered a new writ to be made out. If the Houſe had adopted the previous propoſitions, Glanville would have uſhered in his account of them as he does in other caſes, where the Houſe adopted and confirmed the reſolutions of the Committee, by ſaying, "It was conceived "by the Committee, and ſo reported to the Houſe, and "there reſolved (4) (E).

If this Committee were to ſet aſide the determination of 1770, on a future occaſion a ſubſequent Committee may ſtill conſider it as the rule of their judgment, and thus this borough become an endleſs ſcene of uncertainty and litigation.

COUNSEL for the petitioners, in reply.

It is neither admitted that the act of George the Second had a *proſpective* effect, as has been alledged; nor that a reſolution of the Houſe on the right of election is not binding if the point was not directly the ſubject of controverſy between the parties.

However, neither of thoſe propoſitions, even if they were true, can affect the preſent queſtion; for it has been proved that the right of election was litigated in 1624 (5), Glanville ſtating that it was pretended on the part of Sir Richard Beaumond that the freeholders *only* had voice in election, from which we muſt infer, that the other candidate contended for a more extenſive right; and, if there was a determination then, all idea of a proſpective operation of the ſtatute in the preſent caſe is at an end.

When the act of Parliament ſpeaks of the *laſt determination* in the Houſe of Commons, it means the laſt *reſolution determining*

(4) Glanv. Caſe of Blechingley, p. 33, and other caſes *paſſim*.
(5) Glanv. p. 142.

determining the right of election. All determinations in the Houſe of Commons are called *reſolutions*, as thoſe of the court of Chancery are called *decrees*, and thoſe of the courts of law, *judgments*. "*Determination*" is not a technical word in Weſtminſter-hall, nor the name given to the deciſions of any court in particular; it is a general popular word, expreſſive of Judgments, decrees, reſolutions, &c. according to the court which happens to be in the contemplation of the ſpeaker who uſes it.

One of the objections to the reſolution of 1624 is, that there are two entries of it. As if double evidence of any thing ought to induce us not to give any credit to it. It is ſaid the two entries vary. They do in expreſſion, but are the ſame in ſubſtance, and both the perſons who made them were equally the ſervants of, and authoriſed by, the Houſe (6).

The argument drawn from Mr. Hardinge's report is a ſingular one. It is equally valid againſt any other determination of the right of election in the reign of James the Firſt. Yet the Houſe has, ſince the ſtatute of George the Second, recognized ſuch determinations made in the ſame year with that under conſideration. Thus that of 9th April, 1624, concerning the right of election in Chippenham is, by a reſolution of January, 1741-2, called the laſt determination of the Houſe (7).

The charters anterior to that of Henry the Fourth mentioned by Glanville do not contain any regulation touching the right of election; ſo that though they had been known to the Committee in 1624, their judgment would have been the ſame. Their Hypotheſis is ſtill true,—there was no *charter for choice.*

It will be difficult for the counſel on the other ſide to impeach the credit due to the doctrines of Selden, Coke, Glanville, and the other members of the Committee of 1624, by calling thoſe great men factious republicans, and they will not find it eaſy to gain equal credit to thoſe of ſuch a writer as Dr. Brady. As to what is ſaid by Lord Holt, in the caſe of Aſhby and White, the anſwer to it is, that it was clearly ſaid extrajudicially, and, therefore, can only be conſidered

(6) *Supra*, p. 186.

(7) *Vide ſupra*, Caſe of New Radnor, p. 160, and Note (B) p. 164.

as a haſty opinion not formed upon any mature conſideration of the ſubject.—Whitelock adopts the general rule of the Committee of 1624. "The King," ſays he, "may, by "his charter, make any town a borough, and grant them "the privilege of ſending burgeſſes to Parliament, and the "election of them to be by a ſpecial number of the inhabit-"ants, as principal burgeſſes, aldermen, and the like; but "where the election is by preſcription, it is generally *popu-*"*lar.*"

If the right of election was determined in 1624, no ſubſequent uſage can alter it. In the caſe of Preſton, in 1768, the right of election having been determined, in 1661, in the following manner:

18 Dec. 1661. Reſolved, "That all the inhabitants of "the ſaid borough of Preſton had voices in the election (9)."

The counſel for the ſitting members propoſed to bring evidence to ſhow (by ſubſequent uſage) that the words "*all* "*the inhabitants*" in the reſolution of 1661, mean only "Such in-burgeſſes of the laſt guild, or thoſe admitted ſince "by copy of court-roll, as are inhabitants of the place," but the Houſe reſolved, 29 Nov. 1768, that ſuch evidence ſhould not be admitted (1).

But, as to the uſage in Pontefract, it appears from Glanville, that, in 1624, none of the parties ever imagined that burgage tenure had any thing to do with the right of election. *Freeholders* in the borough (to whom one of the parties confined the right) are not neceſſarily *burgage tenants*. In Taviſtock, and many other boroughs, where there are no burgage tenures, the right of voting is in the freeholders of the borough.

The returns, which have been produced, do not prove the uſage ſince 1624 to have been as contended for. "*Bur-*"*genſes*," in ancient inſtruments, does not mean only burgage tenants. Sir H. Spelman, in his Gloſſary, Title "*Bur-*"*garii et Burgenſes*," defines them to be, "*Burgorum villa-*"*rumque clauſarum habitatores.*" Whitelock, in his Commentary on the Parliamentary Writ, ſays "Burgeſſes "are the *inhabitants* and freemen of boroughs;" and in another part of the ſame work he calls them, "Inhabitants "of towns and boroughs incloſed or fortified." The Houſe

Vide Introd. note (C) p. 33.

(9) Journ. vol. viii. p. 336. col. 2.

(1) Journ. vol. xxxii. p. 79. col. 2.

Houſe of Commons themſelves have interpreted the word to mean inhabitants, both in *charters*, and *returns*.

23 May, 1660. " Mr. Turner reports from the Committee of elections the caſe upon the double return, for " the borough of Abingdon in the county of Berks; That, " upon the examination of the fact, the queſtion appeared " to be, " Whether the word " *burgenſes*" mentioned in " the charter, extends to the *inhabitants* within the borough; " and that the Committee were of opinion, they do extend to the ſaid inhabitants;" and that, " ſubſtracting " two of the electors, who were aliens, and four and fifty " who received relief in the town, and are ſtanding almſmen there, Sir John Stonehouſe, Bart. who is returned by " one indenture, had a greater number of voices than John " Lenthall, Eſq; who is returned by another indenture; " and that therefore the ſaid Sir John Stonehouſe is duly " elected, and ought to ſit.

" Reſolved, That this Houſe do agree with the Committee, that the ſaid Sir George (4) Stonehouſe is duly " elected, and do ſit in the Houſe (5)"

In this caſe of Abingdon, the Houſe muſt have adopted the interpretation put, by the Committee, on the word " *burgenſes*" in the charter, as that is ſtated to have been the only queſtion on which the validity of Sir John Stonehouſe's election turned.

In the caſe of Aldborough in Yorkſhire, in 1690, the main queſtion was, " Whether the right of election was in " a *ſelect* number of burgeſſes, holding by burgage tenure " in the ſaid borough, or in all the *inhabitants* there paying " ſcot and lot."

There were a great many returns produced on both ſides, where the electors were deſcribed by the word " *burgenſes*" and though there was no parole evidence given to ſhow the uſage to be in favour of all the inhabitants, the Committee and the Houſe came to the following reſolution.

17 May, 1690. Reſolved, " That *all the inhabitants* of " the ſaid borough of Aldborough, paying ſcot and lot, " have a right to vote in electing members of Parliament " for the ſaid borough (6).

(4) Should be " *John*."
(5) Journ. vol. viii. p. 42. col. 1 and 2.
(6) Laſt determination. Journ. vol. x. p. 418. col. 1 and 2.

It is to be obſerved that there are burgage tenures in both thoſe boroughs (Abingdon and Aldborough) as well as in Pontefract.

If the Committee ſhould decide on the preſent occaſion as the Houſe did in 1770, when, by one of the laſt acts of its judicial power, an additional and ſtriking example was furniſhed of the impropriety of entruſting it any longer with that power, the deciſion will not bind any future Committee, nor annul the rights of the inhabitants; which, as they depend on an act of Parliament, and are ſecured by it, cannot be taken away by the determination of any particular cauſe like this, will be ſtill as valid as ever on a new election. It is eaſy therefore to ſee which of the two ways in which the Committee may determine the preſent cauſe, is moſt likely to beget future litigation.

On Friday, the 3d of March, the Committee, by their Chairman, informed the Houſe that they had determined,

That the two ſitting members were duly elected (7).

And, on the Monday following, Charles Melliſh, Eſq; having been likewiſe choſen a burgeſs for the borough of Boroughbridge, in the county of York, made his election to ſerve for the borough of Pontefract (8).

(7) Votes, p. 325. (8) Votes, *loc. cit.*

NOTES

NOTES

ON THE CASE OF

PONTEFRACT.

PAGE 183. (A). The annexed Plate is a *fac ſimile* of the firſt of the two entries.

P. 186. (*B*). So we are told by Glanville's book. The whole of what is contained in the father's Journal concerning this election, is the ſhort entry read to the Committee. In the ſon's previous to the entry of the report from the Committee, ſtating the right of election, we find the following:

" 1 April, 1624. Sir Thomas Wentworth prefers a peti-
" tion from Pomfret.——Read.——

" The mayor, before any writ came undertook a place for
" Sir Jo. Jackſon: ſhut the door againſt thoſe, that came for
" Sir Richard Beomont: a number of recuſants and papiſts
" brought in: 40 of them made burgeſſes, to carry the elec-
" tion.—The election being naught, the return cannot be good.
" —To have all reported to the Houſe together.

" Sir George Moore.—This town admitted, the laſt Parlia-
" ment, to ſend burgeſſes ——Since one ſide heard by counſel,
" to have the other heard.

" Mr. Glandvill, upon queſtion, to make the report.——
" Conſidered one point, the validity of the return: Heard no
" counſel on either ſide: Had the writ, and two indentures.
" Sir H. Holcroft double-returned, he waved Pomfrett. A
" new writ went down to Pomfret. The ſheriff makes this
" return: two days after the date of the writ, mayor and al-
" dermen told him, they had choſen Sir Jo. Jackſon: and af-
" ter, the 11th of March, divers other aldermen and burgeſſes
" told him, they had choſen Sir Richard Beomont. He re-
" turned two indentures: 1. Mayor, aldermen, and burgeſſes;
" —The common-ſeal of the town: 2. Four or five aldermen,
" and the reſt burgeſſes, returned Sir Richard Beomont.——
" 20 and odd hands.——

" Committee conceived, theſe ſeveral indentures to be re-
" turned by the ſheriff. They thought, the form of it irregu-
" lar.

" lar. Their opinion, that the return, as it is, hath ſubſtance " ſufficient to warrant Sir John Jackſon to come into the " Houſe. Afore they roſe, a petition exhibited againſt the " election.——Writ good enough, although the * day; becauſe " it begins not till the King come. Two returns, He made a " warrant to mayor, aldermen, and burgeſſes, Sir Jo. Jackſon's " indenture is true then, according to the warrant; other not. " ——Bear date one day.—Looked on the hands to the in- " denture:——40 to one, but 20 to the other. Sir Jo. Jackſon " the greater number. This the ground of the opinion of the " Committee.

" Ordered, That this buſineſs of Pomfret, concerning the " election, ſhall be heard at the Committee of privileges, in " his due time, and turn.

" And left, by the Houſe, to the choice of Sir John Jackſon, " whether to come into the Houſe, or to forbear." Journ. vol. i. p. 751.

" 28 May, Mr. Glanville reports, &c.

P. 186. (C) 26 March, 1621. " Sir Edward Sands moveth " for Pomfrett; which in Ed. I. time, and after, ſent bur- " geſſes: after, decayed by wars.——That the King granted " them a charter, 4 Jac. with reſtitution of all their liberties " and privileges, notwithſtanding they be loſt, forfeited, &c. " That they have ever ſithence—

" Committed alſo to the ſame Committee for privileges." Journ. vol. i. p. 572. col. 2.

27 March. " Sir George Moore reporteth, from the Com- " mittee for privileges; That, for Pomfrett, that 26 Edw. I. " it ſent burgeſſes; which continued a good while after. That, " by reaſon of the baron's wars, it grew poor. That 10° & " 11° H. VI. a return made, they could not ſend burgeſſes, by " reaſon of their poverty. That 4° Jac. the King granted " them all their former liberties and cuſtoms, notwithſtanding " they had been forfeited, or loſt. That the Committee think- " eth it to ſtand both with law and juſtice, that a writ ſhould " go for choice of burgeſſes.—

" Upon queſtion, Pomfrett to ſend burgeſſes.

" Writ ordered." Journ. vol. i. p. 576. col. 1.

By the above, it would ſeem that this borough had been repreſented in Parliament after the reign of Edward the Firſt. But Glanville, who is probably more accurate, though his account is of leſs technical authority, ſays, that it diſcontinued being a parliamentary borough from the time of king Edward the Firſt, and he adds, " That *by reaſon of the long diſcontinu-* " *ance of the borough*, there did not appear any known uſage or " preſcription by whom the election ſhould be made." Glanv. p. 141.

P. 188.

P. 188. (D). From 1715 till 1768, there was no controverted election for Pontefract. 10 Nov. 1768, two petitions were preſented to the Houſe, complaining that at the laſt election, when William Monekton Lord Galway, and Henry Strachey, Eſq. and Sir Rowland Winn, were candidates, the returning officer had been compelled by force to return Sir Rowland Winn, with lord Galway; and that a great majority of the legal voters would have preſented themſelves and voted for Mr. Strachey, if they had not been intimidated by the violence of ſeveral hundred rioters, armed with bludgeons, and other offenſive weapons. Several of the rioters, (as one of the "petitions ſet forth) had been convicted on an information tried at the aſſizes. When the matter of theſe petitions came to be tried (24th November) at the bar of the Houſe. The Houſe reſolved, "That the counſel be confined to proceed "only upon the allegations of the ſaid petitions, which com-"plain of the freedom of the ſaid election being diſturbed by "riots." And after hearing counſel and examining witneſſes the election was declared to be void. On this a new election took place, and Sir Rowland Winn, and his brother Edward Winn, Eſq. being candidates, together with lord Galway, and Henry Strachey, Eſq. the two laſt were returned, and the other two, together with certain inhabitants houſeholders, in their intereſt, petitioned the Houſe, Dec. 14, 1768, on the ground of the reſolution of 1624. The hearing of theſe petitions was, by repeated adjournments, put off to the 6th of February 1770. On that day a doubt ariſing, how far the entries in the two Journals of the 28th of May 1624 were to be conſidered and read to the counſel as the laſt determination of the Houſe within the meaning of the act of George II. counſel on both ſides were heard to that point, after which, "A mo-"tion was made, and the queſtion being put, that the two "entries of the 28th day of May 1624 of reſolutions con-"cerning the right of election for the borough of Pontefract, "appearing in two ſeveral Journals, be admitted to be read to "the counſel at the bar, as the laſt determination of the "Houſe, touching the legality of votes for members to ſerve "in Parliament for that borough; the Houſe divided, and it "paſſed in the negative, 161 to 32." On this the counſel for the petitioners deſired that leave might be given to withdraw their petitions, but this was objected to by the counſel on the other ſide, who deſired to offer evidence to eſtabliſh the right of election. The Houſe reſolved; That the petitions ſhould not be withdrawn. The counſel for the petitioners declined giving the Houſe further trouble. The counſel on the other ſide examined a witneſs to prove the right to be in the freeholders of burgage tenure; and produced ſeveral returns to ſhew that

that the elections were made by the mayor and burgeſſes. They then read the entries in the Journals of 17th Jan. 1699-1700, and of 24th of March 1715-16, on which the Houſe came to the reſolution determining the right as ſtated *ſupra*, p. 184. Journ. vol. xxxii. p. 665. col. 2.

P. 192. (E). There ſeems to be great weight in this obſervation. All that Glanville ſays of the propoſitions in queſtion is, "Out of this caſe theſe points were agreed upon by the "Committee." Yet in his account of another caſe he ſeems to conſider that when the Committee agreed to, and reported, particular propoſitions and a general concluſion from them, the Houſe, in making a determination agreeable to the concluſion, adopted the particular propoſitions. Caſe of Winchelſea, p. 17. he ſays, "In this caſe, divers points were moved, and debated "in the Committee, and reported to the Houſe with their opi-"nions and reaſons; all which, *under the general order and* "*judgment of the Houſe thereupon*, were reſolved and adjudged "accordingly."

XII. THE

XII.

THE

CASE

Of the BOROUGH of

ABINGDON,

In the County of BERKS.

The Committee was choſen on Friday, the 3d of March, and conſiſted of the following Gentlemen.

Paule Fielde, Eſq. Chairman, -	Members for	Hertford
James Scawen, Eſq. - -		Surrey
John Morgan, Eſq. - -		Monmouthſhire
Hugh Owen, Eſq. - -		Pembroke
Edward Morant, Eſq. - -		Lymington
Charles Baldwyn, Eſq. - -		Shropſhire
Gerrard William Vanneck, Eſq. -		Dunwich
Nathaniel Polhill, Eſq. - -		Southwark
Thomas Halſey, Eſq. - -		Hertfordſhire
Ambroſe Goddard, Eſq. -		Wiltſhire
James Whitſhed, Eſq. - -		Cirenceſter
Sir William Guiſe, Bart. -		Glouceſterſhire
Richard Aldworth Neville, Eſq.		Grampound
NOMINEES.		
Of the Petitioner.		
Hon. Thomas Francis Wenman,		Weſtbury
Of the Sitting Member.		
John Orde, Eſq. - -		Midhurſt

PETITIONER.

Nathaniel Bayly, Eſq.

Sitting Member.

John Mayor, Eſq.

COUNSEL.

For the Petitioner.

Mr. Mansfield, Mr. Lee.

For the Sitting Member.

Mr. Bearcroft, Mr. Hardinge.

THE

THE CASE

Of the BOROUGH of ABINGDON.

ON Saturday the 4th of March, the Committee being met, the petition of Nathaniel Bayly, Eſq; was read, ſetting forth; That at the laſt election for the borough of Abingdon, in the county of Berks, the petitioner, and John Mayor, Eſq; were candidates, Mr. Mayor being then high ſheriff of the county of Berks; That at the place of election, and before the taking of the poll, the mayor of the borough, and the other electors were publicly told, that Mr. Mayor being high ſheriff of the county, was incapable of being choſen for the borough, and that all votes given for him would be thrown away; That, however, the mayor himſelf voted, and alſo received the votes of divers other perſons, for the high ſheriff; and that the high ſheriff had returned himſelf as duly elected, in manifeſt prejudice of the petitioner, who, being the only candidate capable of being elected, was duly choſen, and ought to have been returned: Praying, therefore ſuch relief as the Houſe ſhould think juſt and reaſonable (1).

It was admitted that the facts were as ſtated in the petition, and that the majority of votes were in favour of the ſitting member. The queſtion of the high ſheriff's eligibility had been argued by counſel, at the place of election, before the poll began; and, after their arguments, the returning officer

(1) Votes, 6 Dec. 1774, p. 25.

ficer told the electors, that in his opinion, Mr. Mayor, although high ſheriff, was capable of being choſen.

There were two queſtions in this caſe.

1. Whether, the high ſheriff of a county may be choſen to ſerve in parliament for a borough within his county.

2. Whether, if he is not eligible, on ſuch notice as was given in the preſent caſe, the votes for him are thrown away, and the other candidate, who had a ſmaller number of legal votes, duly elected: or, whether it is a void election.

COUNSEL for the petitioner.

By an expreſs clauſe in the writ of election (A), the choice of ſheriffs is prohibited. This clauſe has made part of the writ for above three centuries, and if it were to be omitted, ſuch omiſſion would vitiate the whole; for original writs are of ſo high a nature, that they can be altered by nothing but an act of Parliament.

It is unneceſſary to enquire how the prohibitory clauſe, or the "*nolumus*," (as it is called) was firſt introduced into the writ. Many think it is derived from the act of the 46th of Edward the Third, which Sir Edward Coke holds to be only an ordinance of the Lords, and no ſtatute; while others do not adopt the diſtinction between ordinances and ſtatutes, but conſider both as having the force of acts of Parliament. It was thereby ordained, that no ſheriffs, or men of the law, ſhould be choſen. Accordingly we find that, for ſome time afterwards, the prohibition in the writ extended to lawyers as well as ſheriffs. Coke denies that there was any clauſe to that effect in the writs for the Parliament which was holden in the 6th year of Henry the Fourth, and which was called *parliamentum indoctum*, becauſe no lawyers ſat in it. He cites Walſingham, who ſays there was ſuch a clauſe in thoſe writs, to contradict him, and aſſerts, that the excluſion of lawyers was wrought merely by the king's letters, by pretext of the ordinance of the 46th of Edward the Third. But Prynne gives us the very words of the writs of the 6th of Henry the Fourth "*Nolumus autem quod tu, ſeu aliquis alius* "*vicecomes regni noſtri, aut apprentius, aut aliquis alius homo ad* "*legem, aliqualiter ſit electus*;" and adds, "This appears "by the exemplification thereof in the Clauſ. Roll of "5 Hen. IV. *pars* 2. m. 4. *dorſo*, in the Tower; (which I "have viewed with mine own eyes) by ſundry tranſcripts "thereof in manuſcript; and by the teſtimony of Thomas "Walſingham, who lived in, and wrote the hiſtory of, that "time,

" time (2)." From that period, that part of the clauſe which excluded lawyers, has been dropt, but the other, againſt the election of ſheriffs, has been continued ever ſince.

But ſheriffs, previous to, and independent of, the ordinance or ſtatute of the 46th of Edward the Third, were ineligible at common law, and, if ſo, it is of little conſequence to the preſent queſtion, whether *that* was, or was not an act of Parliament. It appears that in the 13th year of Edward the Third, the Commons prayed, " That writs be ſent, that the worthieſt knights be choſen, and that lawwyers *and ſheriffs be left out* (3) (B);" and Prynne has preſerved a return for Warwick of the 28th of Edward the Firſt, which proves, that the prayer of the Commons in the 13th of Edward the Third, with regard to ſheriffs, was founded on their ineligiblity at common law. Indeed, the King had no power to create a new incapacity, by inſerting in the writ a prohibition not authoriſed either by ſtatute, or the common law. We muſt therefore underſtand the petition of the Commons to Edward the Third, as if they had ſaid that ſheriffs by law were ineligible, but had of late been returned to Parliament, and that it was therefore proper to correct this abuſe, and aſſert their ineligibility in the writ of election. The caſe of the return for Warwick, in the 28th of Edward the Firſt was this. That prince had iſſued writs to the ſheriffs of the different counties in England, " requir-
" ing them to cauſe to come to the Parliament to be held at
" Lincoln, thoſe knight, citizens, and burgeſſes, who had
" ſat in the former Parliament, and if any of them ſhould
" be dead, or ſo ill as not to be able to attend, then to elect
" others in their place (4)." The return of Warwickſhire
" is as follows.

" *Milites electi. S. S. Johannes Perceval de Samoy, &c. maunc.*
" *per, &c.—et idem Johannes fuit ad parliamentum prox. preteri-*
" *tum. S. S. Johannes de Clyntone de Makſtoke electus eſt nunc*
" *loco Philippi de Payton,* EO QUOD IDEM PHILIPPUS EST
" NUNC VICECOMES WARR. ET LEIC. *et predictus Jo-*
" *hannes manuc. per,*" &c. (5).

The

(2) Prynne. Plea for the Lords, p. 380.

(3) Whitel. Comm. vol. ii. p. 357. from 13 Edw. III. Rot. Parl. n. 8.

(4) Prynne's Brief Regiſt. p. 53, 54. & Brev. Parl. red. p. 150.

(5) Prynne, *loc. cit.* p. 55.

The force of the prohibition in the writ has been much ſhaken in caſes of ſheriffs of one county who are returned as members for another. Sir Edward Coke, being ſheriff of Buckinghamſhire, was, in the ſecond year of Charles the Firſt, returned for Norfolk, and ſat till the diſſolution of that Parliament. But his right to ſit was called in queſtion, and both in the Journals, and in the debates, and the writings of his contemporaries, (as of Whitelock, who ſat in the ſame Parliament, (6), he is talked of as only a member *de facto* (7). There is no poſitive determination of the Houſe that a ſheriff can be legally choſen for *any* county.

Till the ſtatute of the 23d of Henry the Sixth, (8) which enacts that precepts ſhall be ſent to the different boroughs and cities entitled to ſend members to Parliament, the ſheriff preſided at the election of all the members within his county (C); and, as it is not diſputed that the prohibition is good againſt ſheriffs returned as knights for their own counties, and this for ſtrong reaſons of convenience and policy, it muſt, for the ſame reaſons, have had equal force, before that ſtatute was made, againſt ſheriffs returned for boroughs within their own counties. The opportunities of partiality and undue influence were, till then, the ſame in both caſes.—If it was a legal and valid prohibition *at that time*, nothing but an act of Parliament can have annulled it ſince, and no ſuch act exiſts.

There are *ſtill* many reaſons of expediency, in favour of the prohibition, even ſince the practice has been eſtabliſhed of directing precepts, for election, to the mayors, or chief officers of boroughs.

The ſheriff has the diſcretionary power of either keeping the precept in his hands three days, or of iſſuing it on the day he receives the writ (9); and it is well known that the fate of an election may often be decided, in different caſes, by retarding or accelerating the arrival of the precept in the borough.

When there are two contending returning returning officers, a ſheriff, who is a candidate, may deliver the precept to the one who is in his own intereſt, and thus make ſure of being

(6) Whitel. Comm. vol. ii. p. 357.
(7) Journ. vol. i. p. 869. col. 2.
(8) Cap. 14.
(9) 7 & 8 Will. III. cap. 25. §. 1.

being returned, and obtain a ſeat in Parliament without having been duly choſen, and, perhaps, ſit for a year or two before the merits of the election can be tried.

In caſe of a double return by two ſeparate indentures, the ſheriff may place that which is in his own favour neareſt to the writ, by which means he will ſecure to himſelf the advantages meant to be given by the ſtanding order of 1727-8 (1).

The wages, to which members of Parliament are entitled by law, are to be levied by the ſheriffs, and if a man were at the ſame time ſheriff and member for a borough within his county, he might be tempted, in that part of his office, to act with partiality, and to ſecure the payment of his own wages, in prejudice of the other members for the county.

Many learned conſtitutional writers have declared their opinion that ſheriffs are not eligible, within their own counties.

Sir Simon d'Ewes, obſerving on the caſe of Sir Andrew Noel, (who was choſen knight of the ſhire for the county of Rutland when he was ſheriff of the county, and, after a debate on the ſubject, was, on that account, removed, 4 Nov. 1601,) ſays, "that the election of one who is firſt ſheriff of "ſome county, and then elected a knight of the ſame, or a "citizen, burgeſs, or baron of any city, borough, or cinque "port of the ſame, is void." He obſerves indeed, "that "on the 21ſt of February, 1588-9, Mr. St. Poole being "both knight for the county of Lincoln, and ſheriff of the "ſame, was allowed his place in the Houſe, and had only "licence given him to depart into his county for the buſineſs "of his ſheriffwick;" but he reconciles this caſe to Sir Andrew Noel's, by ſuppoſing, very reaſonably, that St. Poole, was not made ſheriff till after his return to Parliament, on which ſuppoſition there was nothing in his election contrary to the directions of the writ (2).

Mr. Hackewell of Lincoln's Inn, who was a great parliamentary lawyer, and long a member of the Houſe, lays it down, in his *Modus tenendi Parliamenti*, "That no ſheriffe "ſhall be choſen for a knight of the Parliament, nor for a "burgeſſe (3)."

Lord

(1) *Vide ſupra* Caſe of Milborne Port, p. 49.
(2) D'Ewes's Journ. p. 624, 625.
(3) P. 49.

Lord Chief Juſtice Hale recognizes the ſame doctrine (4); and Mr. Juſtice Blackſtone ſays, "ſheriffs of counties, and "mayors, and bailiffs of boroughs are not eligible in their "reſpective juriſdictions (5)."

There are many caſes in the Journals where this doctrine is recognized, but in that of Stamford, in the year 1677, the very point now under the conſideration of the Committee was determined. The caſe was briefly this:

Mr. Hatcher, high ſheriff of Lincolnſhire, at the election of member for the borough of Stamford in that county, had the majority of voices; but the returning officer of the borough returned Henry Nowel, Eſq; the other candidate, as duly elected, and this return was, by the ſheriff *himſelf* annexed to the writ, and forwarded to the clerk of the crown. Hacther offered to preſent a petition, which produced a long debate on the ſubject of his eligibility for a borough in his own bailiwick (6), and was, upon the queſtion, rejected (7).

If the ſitting member was not eligible, the Committee muſt decide that the petitioner is duly elected. Where a diſqualification depends upon a *fact*, which is not of public notoriety; as, for inſtance, the candidate's being under age, allowance is made for the ignorance of the electors who vote for the perſon ſo diſqualified, and their ſuffrages are not conſidered as thrown away, unleſs they have formal notice of his diſability at the time of the election. But the notoriety of the *law* is always preſumed. Therefore, even if nothing had been ſaid of the legal inability of ſheriffs to be choſen members of Parliament, at the time of the election, the votes given for the ſitting member would nevertheleſs have been thrown away; for as to the *fact* of his being ſheriff, that was, of courſe, known to all concerned in the election. However, the voters were, in truth, publicly informed both of the fact and the law; ſo that there cannot be the ſmalleſt pretence of ſurprize.

COUNSEL for the ſitting member.

The authority of mere *civil* writs is unqueſtionable. They are undoubtedly the beſt evidence of the law. But the ſame cannot be ſaid of *political* writs. They rather teſtify, and particularly

(4) Hale of Parl. p. 114.
(5) Blackſt. Comm vol. i. p. 175.
(6) Grey's Deb. vol. iv. p. 315.
(7) Journ. vol. ix. p. 407. col. 1.

particularly the writs of election, the tyranny of our Kings, and the arbitrary power they aſſumed, in former periods of the conſtitution.

If it were neceſſary to comply exactly with the letter of the writ, it might be made an objection to the election for a county, that the ſheriff has not returned "two knights "girt with ſwords (D);" and it was well obſerved by the returning officer, at this very election, that, by the words of the writ, he was commanded to return *two* burgeſſes, and yet no one would inſiſt on a compliance with that injunction, ſince Abingdon has only a right of ſending one (E).

The act of the 46th of Edward the Third is clearly not a ſtatute; for in the roll it is diſtinguiſhed from the ſtatutes of that year. The words are, "The *petitions* which "the Commons had preſented in Parliament, and the "*anſwers* to them were read, and likewiſe an *ordinance*, "&c (8)." Now it is well known that, in thoſe days, the ſtatutes were in the form of *petitions and anſwers*, and they are evidently mentioned here as ſomething different from this ordinance.

If this ordinance were to be conſidered as an act of Parliament, yet the evil which it complains of (and, therefore, that which it was intended to remedy) is only that ſheriffs had been returned for *knights of the ſhire* (9). *Burgeſſes* of Parliament, therefore, were not then in contemplation, and the proviſion cannot be conſtrued to extend to them: eſpecially when it is conſidered that laws creating diſabilities, and in derogation of general rights, are to be taken ſtrictly.

As to the writs of the 28th of Edward the Firſt, and the return for Warwickſhire, the whole of that tranſaction ſeems to have been ſo contrary to law, the King dictating who the people were to chooſe for their repreſentatives, that no ſolid argument can be built upon it. Beſides, in that caſe, though Clinton the ſheriff was thought to be ineligible for his county, it does not follow that they would not have choſen him for a borough within his county.

The petition in the 11th of Edward the Third, only ſhows that lawyers and ſheriffs were by the petitioners conſidered

(8) Append. to Ruffhead's ed. of the Stat. p. 43.
(9) Ruffhead App. *loc. cit.*

ſidered as improper perſons to be returned to Parliament.—It does not appear to have been complied with.

The "*nolumus*" in the writ extends to all ſheriffs. Yet it will not, at this day, be contended that the ſheriff of one county is not eligible for a borough in another. In the beginning of the laſt Parliament, Mr. Child, being ſheriff of Warwickſhire, was choſen and returned for Wells, in the county of Somerſet. He was petitioned againſt, and the merits of his election tried before the Committee of privileges and elections, and they, and the Houſe, determined, 9 March, 1768, That he was duly elected (1) (F).

In like manner, if the prohibition of the writ were adhered to, a ſheriff of one county could not be choſen knigh of the ſhire for another. The counſel for the petitioner admit that its authority in that reſpect has been much ſhaken. Sir Simon d'Ewes ſays, "Although a man may "be firſt made a ſheriff of ſome county, and be afterwards "elected a knight, citizen, burgeſs, or baron of, and in, "ſome other ſhire or county, it ſhould ſeem his election "ſtandeth good (2)."

The queſtion of Sir Edward Coke's eligibility was moved on the 10th of February, 1625-6, in conſequence of a meſſage from the King (G), and it was ordered to be *firſt* heard by the Committee of privileges (3); yet it appears that he had privilege of Parliament allowed him on the 9th of June following (4), which ſhows that, notwithſtanding the King's impatience to have him removed from the Houſe, it was not in his power to obtain a deciſion againſt his eligibility.

If ſheriffs are eligible for any other country but their own, why ſhould they not be ſo for boroughs in their own county? It has been ſhown that the election of ſheriffs to be *knights* was the ſuppoſed evil which the ordinance of Edward the Third (on which the "*nolumus*" in the writ is clearly founded) was intended to remedy. Is the prohibition to have no force in the caſes which it was parti-

(1) Journ. vol. xxxii. p. 299. col. 2.
(2) D'Ewes' Journ. p. 625.
(3) Journ. vol. i. p. 817. col. 2.
(4) Same vol. p. 869. col. 2. Littleton's Rep. Long's Caſe, p. 340.

cularly aimed at, and to operate in thoſe which it was not intended to affect?

Since the ſtatute of the 23d of Henry the Sixth, the ſheriff is in no reſpect the returning officer for boroughs. He is obliged to accept the return ſent him with his precept, and is merely the conduit-pipe to convey it to the clerk of the crown. If, therefore, we were to ſuppoſe that the prohibition of the writ was valid before that ſtatute, becauſe of the ſuppoſed partiality of the ſheriff if he could have returned himſelf, and becauſe (as Mr. ſerjeant Croke quaintly expreſſes himſelf in Hatcher's caſe) a man cannot be *agent* and *patient* at the ſame time, yet, ſince the ſtatute, thoſe reaſons no longer exiſt, and *ceſſante cauſa, ceſſat effectus.*

The ſheriff does not ſign the indenture for a borough which is ſent to the clerk of the crown, but only the counterpart left in the country, which is nothing more than a memorandum or certificate; for when a return is to be amended, the amendment is made on the indenture ſent to the clerk of the crown. It is never thought neceſſary to alter the counterpart in the country. Formerly the returning officer of the borough, not the ſheriff, uſed to be ſent for, to amend his own return; or, in ſome inſtances, it was ſent down to him to be altered in the country (5).

It is not even neceſſary to the validity of a return that it ſhould paſs through the hands of the ſheriff. This appears from the caſe of Leſkeard, in Townſhend's Collections (6). "The burgeſſes of that borough being elected, the town "refuſed to deliver up their indenture to the ſheriff; but "the party elected made his indenture, and delivered it to "the clerk of the crown, who filed it with the reſt of the "indentures returned by the ſheriff, having indorſed it "upon his writ; but the indenture was never executed by "the ſheriff, nor returned; and yet this indenture was "held by the Committee to be good."

It is ſaid that, in levying the wages of the members for his county, a ſheriff might be partial to himſelf. Such an argument will not have much weight. Suppoſe a ſheriff ſhould give himſelf the preference, may not executors do the

(5) *Vide ſupra*, Introduction, note (W) p. 47.
(6) Page 63.

the ſame? There is nothing illegal in it, ſince the law, in the caſe of executors, countenances ſuch a preference.

There is not much greater weight in the argument drawn from the power which the ſheriff has of iſſuing his precept either on the firſt or laſt of the three days, after he receives the writ; for there is always intelligence, and ſubſtantial notice of an election, before the precept arrives.

But a general anſwer to all the arguments drawn from the ſuppoſed partiality and miſconduct of ſheriffs, is, that the law will not *preſume* fraud and miſconduct in its officers.

Obſerve what might be the conſequence, if it were to be holden that ſheriffs cannot be choſen members of Parliament. The Crown would then be able to prevent any one from being elected, by taking care to make him a ſheriff before the election. On a general election, in bad times, every friend to the rights of the people might, by this means, be excluded from the Houſe of Commons.

The paſſage cited from Sir Simon d'Ewes is merely a *dictum* of his, and his manner of reconciling the caſe of St. Poole with Noel's caſe, nothing but conjecture.

Mr. Juſtice Blackſtone ſays, "That ſheriffs, mayors, "and bailiffs, are not eligible in their *reſpective* juriſ- "dictions, *being returning officers.*" It has been ſhown that ſheriffs cannot be conſidered as the returning officers for boroughs; and the meaning of this paſſage is, that a mayor or bailiff cannot be choſen *within his juriſdiction as returning officer*; that is, he cannot be choſen for his borough, and that a ſheriff cannot be choſen *within his juriſdiction as returning officer*; that, is, he cannot be choſen for his own county.

In Willis's Notit. Parliam. we find that Barnard Granville, ſheriff of Cornwall, was member for Bodmin in that county; and it is no objection to the authority of that precedent, that there is no account of any complaint or petition againſt him; for the Houſe, if he had not been eligible, would themſelves have taken notice of it, and would have amoved him (H), as they would a peer if he were to be elected and returned.

In the year 1727, Charles Bathurſt, Eſq. was returned for the borough of Richmond in Yorkſhire, and a petition was preſented againſt him, and that very petition mentioned

that he was, at the time of the election, high ſheriff of the county; yet, on the trial of the cauſe, no objection was made to him on that account, and, though it was determined againſt him, (14th March, 1727-8) it was decided on quite different grounds (7).

The counſel on the other ſide have only produced one caſe in favour of the doctrine they have to ſupport; and in the debate on that very caſe, that of Sir Walter Long is cited, who was member for Bath, and ſheriff of the county at the ſame time; and Mr. Oakley ſaid, in the ſame debate, that he was member for Biſhop's Caſtle, in the Convention Parliament, when he was ſheriff of Shropſhire, and ſat without controverſy (3).

Hatcher's caſe was not like the preſent. For he had returned *another*, and, therefore, the Houſe thought that he was, by his own act, eſtopped from complaining of the return. That his petition was rejected on this ground (however unreaſonable, ſince he was *obliged* to accept the return made by the preſiding officer of the borough) is evident from the following entry in the Journals.

27 March 1677. "A motion being made that the "petition of Mr. Hatcher, high ſheriff of the county of "Lincolne, exhibited to the Committee of privileges "and elections, ſetting forth, that he is duly elected "for the town of Stamford in the ſaid county, [*be rejected* "(9);] *he having himſelf returned Henry Nowell, Eſq. as* "*duly elected for the ſaid town*; Reſolved, That the "petition of Mr. Hatcher, high ſheriff of the county of "Lincolne, exhibited to the Committee of privileges and "elections, touching the election for the town of Stam-"ford within the ſaid county, be rejected (1.)"

But, at moſt, this is only one precedent, and it happened at ſo unſettled and factious a time, that its authority cannot be great; ſurely not ſufficient to eſtabliſh a diſqualification which would affect ſo many, and might be attended

(7) Journ. vol. xxi. p. 25, 26, 27. col 2. 78. col. 1, 2. 86. col 1.

(8) Grey's Deb. vol. iv. 316.

(9) Thoſe words [*be rejected*] are not in the entry of the motion, but evidently ought to be there to complete the ſenſe, and make it correſpond with the reſolution.

(1) Journ. vol. ix. p. 407. col. 1.

tended with ſuch ill conſequences. If a ſingle precedent were ſufficient for ſuch a purpoſe, the Attorney General could not ſit in Parliament, for the Journals will furniſh an inſtance where the Houſe decided that he was not eligible, and, when he had been returned, declared his election void (2). 9 and 10 Feb. 1625-6 [I.]

If the Committee ſhould be of opinion that the ſitting member was not eligible, yet it cannot be contended that thoſe who voted for him threw away their votes, as they acted in conſequence of the deciſion of the magiſtrate who preſided at the election, and who, after hearing counſel, declared to the electors that the ſitting member was not diſqualified. In the debate in Hatcher's caſe, whoſe authority is truſted to ſo much, Mr. Powle ſaid, and, as to *that*, was not contradicted, "that, though the ſheriff be incapable of ſerving, "it ſhall not make the *minor* part capable to elect [3]." At all events, therefore, the petitioner cannot ſucceed in being declared duly elected. If the ſitting member was not eligible, the election was void.

COUNSEL for the petitioner, in reply.

The maxim, that fraud is not to be preſumed, is true, with regard to *particular* caſes, but in conſtruing the law upon a *general* queſtion, (ſuch as the preſent) that conſtruction is to be preferred which leaves the leaſt room for fraud, and beſt ſerves to prevent it.

The entry of the order for allowing Sir Edward Coke privilege of Parliament is in the following words: 9 June, 1626. "Upon queſtion, Sir Edward Coke, ſtanding *de* "*facto* returned member of this Houſe, to have privilege "againſt a ſuit in Chancery commenced againſt him by "the lady Cleare." This proves that he was not then conſidered as a legal member of the Houſe.

The caſe of Granville has only been cited from Willis, a very modern author, and it does not appear that he was not appointed ſheriff after his election.

The Richmond caſe was decided on the merits of the election, and it was, therefore, unneceſſary for the parties, or

(2) Journ: vol. i. p. 456, col. 1. 2. 460. col. 2.
(3) Grey's Deb. *loc. cit.*

or the House, to go into the question of Mr. Bathurst's eligibility.

Sir Walter Long's case is misrepresented by Mr. Powle, in the debate on the case of Stamford; for it appears, from Lyttleton's Reports, that he was sheriff of *Wiltshire*, and member for Bath in the *county of Somerset*; and Covert, whose case was cited by the counsel on one side in that of Long to show that a sheriff is eligible in his county, was proved to have been sheriff in *Sussex*, and member for Petersfield in *Hampshire* (4).

In whatever manner the entry in the Journals of the proceeding in Hatcher's case may be worded, it is evident from the debate on that occasion, that the chief question in the House was the eligibility of a sheriff within his county. That case, therefore, is a precedent in point; and as no instances can be given of sheriffs sitting in Parliament for any borough within their county (K), when their election was controverted, the law must be now considered as established, and unalterable but by act of parliament.

As to the power the King will have, if sheriffs are thought to be ineligible within their counties, of excluding from the House persons obnoxious to the court, there is little reason to be alarmed with fears on that score; for a man who is inclined to oppose the Crown, will have fully as good an opportunity of doing so as sheriff, as he would have as member of Parliament; seeing that, as sheriff, he has of course a very great influence in his county, and great authority in all elections there; so that if he cannot himself be returned to Parliament, he may promote the election of others equally hostile to the court.

If the sitting member, being sheriff of the county, was *ineligible*, it is a clear consequence, (especially after the formal notice which was given before the poll began) that the votes in his favour were thrown away, and that the petitioner was duly elected. This principle, in all the debates on the Middlesex election, was never questioned on either side.

On Monday, the 6th of March, the Committee, by their Chairman, informed the House, that they had determined (L),

That neither the sitting member, nor the petitioner were duly elected; and that the election was void (5).

(4) Lyttleton's Rep. p. 330.
(5) Votes, p. 350.

NOTES

NOTES

ON THE CASE OF

ABINGDON.

PAGE 203 (A). THE WRIT to the ſheriff of Oxfordſhire, (tranſcribed from the original in the office of the clerk of the crown.)

" George the Third, by the grace of God, of Great Britain, " France, and Ireland, King, defender of the faith, and ſo " forth; to the ſheriff of the county of Oxford greeting. " Whereas, by the advice and aſſent of our council, for certain " arduous and urgent affairs concerning us, the ſtate, and de- " fence of our kingdom of Great Britain, and the church, " we have ordered a certain Parliament to be holden at our " city of Weſtminſter, on the twenty-ninth day of November " next enſuing, and there to treat and have conference with " the prelates, great men, and peers of our realm, we com- " mand and ſtrictly enjoin you, that (proclamation being made " of the day and place aforeſaid in your next county court to " be holden after the receipt of this our writ) two knights of " the moſt fit and diſcreet of the ſaid county, girt with ſwords, " and of the univerſity of Oxford two burgeſſes, and of every " city of that county two citizens, and of every borough in " the ſame county two burgeſſes, of the moſt ſufficient and " diſcreet, freely, and indifferently by thoſe who at ſuch pro- " clamation ſhall be preſent, according to the form of the ſta- " tutes in that caſe made and provided, you cauſe to be elect- " ed; and the names of thoſe knights, citizens, and burgeſſes " ſo to be elected (whether they be preſent or abſent) you cauſe " to be inſerted in certain indentures, to be thereupon made " between you and thoſe who ſhall be preſent at ſuch election; " and them at the day and place aforeſaid you cauſe to come, " in ſuch manner that the ſaid knights for themſelves and the " commonalty of the ſame county, and the ſaid citizens and " burgeſſes for themſelves and the commonalty of the ſaid uni " verſity, cities, and boroughs reſpectively, may have from " them full and ſufficient power to do and conſent to thoſe " things which then and there, by the common council of

" our

" our ſaid kingdom, (by the bleſſing of God) ſhall happen " to be ordained upon the aforeſaid affairs, ſo that for want " of ſuch power, or through an improvident election of the " ſaid knights, citizens or burgeſſes, the aforeſaid affairs may " in no wiſe remain unfiniſhed; *willing nevertheleſs, that nei-* " *ther you nor any other ſheriff of this our ſaid kingdom be in any* " *wiſe elected*, and that the election in your full county ſo " made diſtinctly and openly, under your ſeal, and the ſeals " of thoſe who ſhall be preſent at ſuch election, you do certify " to us in our Chancery, at the day and place aforeſaid with- " out delay, remitting to us one part of the aforeſaid inden- " tures annexed to theſe preſents, together with this writ. " Witneſs ourſelf at Weſtminſter, the firſt day of October, in the " fourteenth year of our reign."

The writs to ſheriffs are all in the ſame form, except that in this, and in *that* to the ſheriff of Cambridgeſhire, there is a clauſe for the election of members for the reſpective univerſities. I have inſerted one of *them* on that account, becauſe in the caſe of Wigtown an argument is drawn from the word *burgeſs*, as applied to the members for the univerſities.

☞ The writ to the ſheriffs on a general election is not printed in the appendix to the common book on the law of elections.

P. 204. (B) This petition of the Houſe of Commons in the 13th of Edward III. affords a preſumption that the prohibition of the 46th of the ſame King was ordained in conſequence of a petition of theirs; and if ſo, it was, according to the forms of thoſe days, an act of Parliament.

P. 205. (C) Before the ſtatute of the 23d of Henry VI. it was the " uſual cuſtom in *ſundry* counties of the realm to elect " their knights, citizens, and burgeſſes, on the ſame day, in " their county court, by the ſuitors or others reſorting to it, " or by four or five citizens or burgeſſes only, (whereof the " mayor, bailiff, or chief officer was uſually one) ſent from " every city or borough to the county court to elect their citi- " zens or burgeſſes, ſo ſoon as the knights were choſen, and " to return both the knights, citizens, and burgeſſes names, " in, or by, one indenture alone, or the knights in one inden- " ture by themſelves, and all the citizens and burgeſſes thus " elected in and by one indenture diſtinct from the knights, " under the ſeals of the citizens and burgeſſes electing them." See Prynne's Brev. Parliam. red. p. 252, where this is proved by a great variety of returns in the reigns of Henry V. and Henry VI. " Some boroughs uſed to *elect* four, or a ſmall " number of burgeſſes, who went to the county court, and, " for the whole body, elected the burgeſſes." *Id. ibid.* p. 256. This was ſomething analogous to the preſent mode of electing delegates

delegates to chooſe the members for the royal boroughs in Scotland.

" The form of electing citizens and burgeſſes at the county " court, was not univerſally obſerved in all counties; but the " ſheriff of many ſhires ſent either the writs themſelves, or " precepts grounded thereon, to the mayors and bailiffs, to " elect and return citizens and burgeſſes, which they accord- " ingly did, and returned by ſpecial indentures long before " the ſtatutes of 7 Henry IV. and 23 Henry VI." *Id. Ibid.* p. 261. This he proves likewiſe by a great number of inſtances; one of them as far back as the reign of Edward the Second.

P. 208. (D) By the ſtatute of 23 Henry VI. cap. 14. § 3. " It is enacted, that the knights hereafter to be choſen ſhall be " notable knights of the ſame counties for which they ſhall be " choſen, or *otherwiſe, ſuch notable eſquires, gentlemen of birth,* " *of the ſame counties, as ſhall be able to be knights.*" So that the neceſſity of being a knight, in order to be eligible for a county has been diſpenſed with by act of Parliament, and yet the direction to chooſe knights girt with ſwords is ſtill retained in the writ. Long before the ſtatute juſt mentioned, there are inſtances of returns of perſons who were not knights, for counties. Prynne has printed one, by the ſheriff of Northumberland, 34 Edw. III. which ſets forth, that, there being only one knight in the county, and he " *languidus et impotens ad* " *laborandum,*" two others who were not knights, had been returned, (Brev. Parl. red. p. 167) and another of the ſame ſort by the ſheriff of Rutlandſhire, in the 4th of Edward the Second. *Id. ibid.* p. 170.

P. 208. (E) Abingdon was made a parliamentary borough, with power to ſend one burgeſs to Parliament, in the 2d and 3d of Philip and Mary.

P. 209. (F) The petition of Peter Taylor, Eſq. and certain electors of Wells, complaining of an undue election and return of Clement Tudway, Eſq. and Robert Child, Eſq. was preſented to the Houſe, and referred to the Committee of privileges and elections, 15 Nov. 1768. Journ. vol. xxxii. p. 36. col. 1, 2. On the 9th of March following, the Committee reported, " That they were of opinion that both Mr. Tudway " and Mr. Child were duly elected, to which the Houſe agreed." Same vol. p. 299. col. 2. Mr. Child was ſheriff of Warwickſhire at the time of his election, but that was not objected to him in the petition.

P. 209. (G) 10 Feb. 1625-6, " Mr. Chancellor of the Ex- " chequer delivered a meſſage from his Majeſty; That, taking " notice of an order here, to ſend out writs, upon double re- " turns, taketh alſo knowledge, that Sir Edward Coke, being " ſheriff

" ſheriff of Buckingham, and being returned one of the knights " for the ſhire for Norfolke, contrary to the tenor of the writ, " hopeth this Houſe will do him that right, as to ſend out a " new writ.——Mr. Chancellor of the Duchy moveth, to re- " fer this to the Committee of privileges; and report to the " Houſe their opinions of the law, and uſage.——Reſolved.— " And to be *firſt* heard." Journ. vol. i. p. 817. col. 2.

P. 211. (H) There is ſuch an inſtance in the caſe of the Attorney General. *Vide infra*, note (*I*).

P. 213. (*I*) 8th April 1614, " Mr. Duncombe:—To have " the privileges examined firſt, and openly; particularly, " whether Mr. Attorney General may be choſen in reſpect no " precedent, that an Attorney General choſen.——Writ of at- " tendance.—Sir H. Hobart's caſe ruled, becauſe then a mem- " ber of this Houſe, when choſen Attorney. Mr. Alford " moveth, that the Houſe may determine, whether Mr. At- " torney may ſerve." Journ. vol. i. p. 456. This motion produced a long debate, and the matter was referred to a Committee to ſearch for precedents. 11 April, That Committee reported, That Sir Henry Hobart was the only Attorney General who appeared, in the clerk's hand, to have been in the Houſe; that he was of the Houſe when he was made Attorney, and, by connivency, continued to ſerve.—After a new debate, the queſtion was put, " Whether [Mr. Attorney] ſhall for this " Parliament remain of the Houſe, or not:——Reſolved, He " ſhall. 2. Whether any Attorney General ſhall, after this " Parliament, ſerve as a member of this Houſe:—Reſolved, " No." Journ. vol. i. p. 456. col. 1, 2. 460. col. 2.

9 Feb. 1625-6, " Mr. Speaker moveth, that Mr. Attorney " returned from Greeneſtead, and mentioned the order. 12° " *Jac.*"

" The order to be brought, and read, to-morrow morning; " and then order to be taken for it in the Houſe." Journ. vol. i. p. 817. col. 1.

" 10 Feb. A new writ, for choice of another burgeſs for " the borough of Eaſt Grinſteade, in the room of Sir Ro. " Heath, his Majeſty's Attorney General, according to the " precedent of 12 *Jacobi*." Journ. ſame vol. *loc. cit.* It appears, by the Journals, that, ſoon after the Reſtoration, the Attorney General ſat in the Houſe, and that his eligibility has never been objected to ſince.

P. 214. (K) There are inſtances of ſheriffs, returned for boroughs within their own counties, and allowed to ſit, although objected to at their election, and petitioned againſt.

5 Decem. 1710. A petition was preſented complaining of an undue election and return for Derby, ſetting forth, That, at the election, the petitioners openly, in public court, objected againſt

againſt Mr. Harpur, one of the ſitting members, as incapable of being elected, for that he was then high ſheriff of Derbyſhire. This, and a general charge of bribery againſt him and the other ſitting member, was all the complaint of the petition. Journ. vol. xvi. p. 419. col. 1. It was withdrawn, by the leave of the Houſe, on the 19th of Feb. following. Journ. ſame vol. p. 507. col. 1.

P. 214. (L) The caſe of Sir George Selby, who in the reign of James the Firſt, being ſheriff of Durham, was returned for the county of Northumberland, was not, as far as I recollect, cited by the counſel, in this caſe of Abingdon, but I have great reaſon to think that it weighed very much with the Committee.

" 9 April 1614. Mr. Francis Moore reporteth the proceedings of the Committee for privileges, yeſterday.

" For the petition of Northumberland,

" The petition four things:

" 1. Setting back the clock, and then refuſing to take " voices after nine.

" 2. *That Sir George Selby not eligible; for that no ſheriff, by " the writ, to be choſen; where Sir George ſheriff of Durham " Biſhoprick.*

" 3. For want of freehold.

" 4. For want of reſidence in that ſhire.

" That Sir George preſent, alledged, that the biſhop had " diſcharged him before the election.

" The Committees———

" The ſheriff's——ſtill executed by him———

" For the undue election; thought fit, the ſheriff ſhould be " ſent for, by the greateſt number of Committee.

" The other two points not thought fit to be examined, for " that, the electors' fault, not the ſheriff's."

(Here ſome other matter intervenes.)

" Mr. Fuller—Sir George Selby to be diſcharged, and a " new writ for a new choice; and the ſheriff to be ſent for.

" Sir Edw. Sands:—1. Whether a ſheriff may be returned.

" 2. Whether a ſheriff of Durham.——

" A ſheriff not to return himſelf.———

" The words of the writ not ancient, to reſtrain the election " of ſheriffs—Not ancient, therefore not the common law, " nor by ſtatute law: *Ergo*, this no ſufficient warrant.

" For Durham; the ſheriff not made by the King, but the " biſhop; and for life, not for a year.

(Here ſome other matter intervenes.)

" Sir Roger Owen:—That the writs anciently ſuch as now, " to reſtrain electing or returning of ſheriffs, for in the Regiſter, and *Nat. Brevium* *.———

" For

* The writ is in neither of thoſe books.

" For Durham ſheriff, the like for them as for the ſheriff of " Cheſter and Cornewayle, &c.———

" The reaſon why reſtrained; for that he hath *cuſtodiam co-* " *mitatus*; and commandeth all duties, &c. and is to execute " all proceſſes."——

(Here again ſome other matter intervenes.)

" Sir Henry Montague:—That no ſheriff can by the law " be choſen: The writ in the negative.

" Reſolved, upon the queſtion, that Sir George Selby, " ſheriff of Durham, cannot be choſen knight of the ſhire for " Northumberland: and ordered, that a warrant be made, by " Mr. Speaker, to the clerk of the crown, for the election of " another knight for that ſhire in his place." Journ. vol. i. p. 457. col. 2. 458. col. 1.

XIII. THE

XIII.

THE

CASE

Of the TOWN of

SHREWSBURY,

In the County of SALOP.

The Committee was choſen on Tueſday, the 7th of March, and conſiſted of the following Gentlemen.

John Orde, Eſq. Chairman, -	Members for	Midhurſt
John Elwes, Eſq. - -		Berkſhire
Richard Aldworth Neville, Eſq.		Grampound
Sir Cecil Wray, Bart. - -		Eaſt-Retford
Charles Brett, Eſq. - -		Leſtwithiel
John Cooper, Eſq. - -		Downton
William Ewer, Eſq. - -		Dorcheſter
William Chaſin Grove, Eſq. -		Weymouth, &c.
Edwin Laſcelles, Eſq. - -		Yorkſhire
Daniel Laſcelles, Eſq. - -		Northallerton
John Darker, Eſq. - -		Leiceſter
George Bridges Brudenell, Eſq. -		Rutlandſhire
Lucy Knightley, Eſq. - -		Northamptonſhire

NOMINEES.

Of the Petitioners.

Right Hon. Thomas Townſhend — Whitchurch, Hants

Of the Sitting Member,

Henry Herbert, Eſq. - - — Wilton

PETITIONERS.

Certain Burgeſſes, and others, Electors of the Town of Shrewſbury.

Sitting Member.

Charles Leighton, Eſq.

COUNSEL.

For the Petitioners.

Mr. Mansfield, Mr. Kenyon.

For the Sitting Member.

Mr. Bearcroft, Mr. Davenport.

THE

THE CASE Of the TOWN of SHREWSBURY.

ON Tueſday the 6th of December, 1774, a petition of William Pulteney, Eſq; was preſented to the Houſe, ſetting forth; That, at the laſt election of members, to ſerve in Parliament for the town of Shrewſbury, Robert Lord Clive, in the Kingdom of Ireland, Charlton Leighton, Eſq; and the petitioner, were candidates; and that the mayor, by admitting votes for Lord Clive, and Mr. Leighton, which ought to have been rejected, and rejecting others for the petitioner which ought to have been received, had ſtated a majority on the poll in favour of Lord Clive, and Mr. Leighton, and had returned them, although the petitioner would have had a very great majority, if juſtice had been done to him (1).

On Friday, the 16th of the ſame month, a petition was preſented, of certain burgeſſes and others, entitled to vote for members of Parliament for the town of Shrewſbury, containing ſimilar allegations with the former, but only againſt the election and return of Mr. Leighton (2).

Both theſe petitions were appointed to be taken into conſideration on the ſame day.

In the mean time Lord Clive's death happened (3), but a new writ could not iſſue, while a petition was depending which queſtioned the legality of his election; becauſe, if it ſhould

(1) Votes, p. 25, 26.
(2) Votes, p. 85, 86.
(3) 22 Nov. 1774.

ſhould turn out on the trial that he was not duly elected, and that both Mr. Pulteney and Mr. Leighton were, then his death not had occaſioned a vacancy.

On Monday, the 20th of February, 1775, the day for taking the two petitions into conſideration was altered from the 24th of that month, which was the day firſt appointed, to the 7th of March (4).

On Monday, the 6th of March, Mr. Pulteney had leave to withdraw his petition (5); and, on the 9th, a new writ was ordered for electing a burgeſs in the room of Lord Clive (6).

The only petition, therefore, for the conſideration of the Committee, when they met on Wedneſday, the 8th of March, was that of the burgeſſes and electors, and Mr. Leighton's was the only election complained of.

The laſt determination of the right of election in Shrewſbury is as follows.

9 April, 1723. Reſolved, "That the right of election "of burgeſſes to ſerve in Parliament for the borough of "Shrewſbury, in the county of Salop, is only in the burgeſ- "ſes inhabiting in the ſaid borough, or in the ſuburbs there- "of, paying ſcot and lot, and not receiving alms or cha- "rity (7)."

On the poll the numbers ſtood,

For Lord Clive,	210
For Charlton Leighton, Eſq;	178
For William Pulteney, Eſq;	171

If a claſs of men, who had tendered their ſuffrages, and had been rejected by the returning officer, were entitled by law to vote, it was admitted that Mr. Pulteney had a majority, and was duly elected.

The queſtion then, was, Whether the Committee ought to allow their votes.

For the petitioners, it was contended,

That the perſons, whoſe votes had been rejected, were entitled to their freedom in Shrewſbury, under two immemorial cuſtoms, *viz.*

1. That all perſons, of the age of one and twenty, and who have ſerved a ſeven years apprenticeſhip to one of the trades

(4) Votes, p. 247.
(5) Votes, p. 328.
(6) Votes, p. 351.
(7) Journ. vol. xx. p. 194. col. 1.

trades which form fourteen ancient companies by preſcription or incorporation in this borough have a right to demand and be admitted to their freedom, on paying five pounds, and the uſual fees.

2. That all perſons, born within the borough, are, at the age of one and twenty, entitled, in like manner, to demand and be admitted to their freedom, on payment of five pounds, and the uſual fees.

The fact, that the rejected voters came under the deſcription of one or the other of thoſe two cuſtoms, was not diſputed.

It was proved, that, more than a year before the election, they had tendered the fees to the perſons whoſe province it is, by the law of the place, to admit freemen: that they had claimed to be admitted, and were refuſed.

It was likewiſe proved, that they had tendered their votes at the election.

But the two cuſtoms were called in queſtion.

In 1771, one Baxter, claiming his freedom under thoſe cuſtoms, had brought a *mandamus* in the court of King's Bench.

On the trial of that cauſe, the corporation contended, that the two cuſtoms, which the plaintiff alledged to be immemorial, were only introduced by a bye-law of 1642, which bye-law was repealed in 1733.

The plaintiff maintained, that the bye-law was only declaratory of the ancient cuſtom, which could not, therefore, be affected by the repeal of ſuch bye-law.

The jury found for the plaintiff.

Baxter, in conſequence of the judgment in his favour, ſued out a *peremptory mandamus*, and was admitted to his freedom. —But the corporation, after that deciſion, ſtill refuſed to admit the other perſons who claimed under the cuſtoms.

In the caſe of Baxter, they had moved for a new trial, which was refuſed; but, a ſecond *mandamus* being obtained againſt them, they moved that this new cauſe might be tried at bar: this was granted by the court, and, on that occaſion, the judge who tried the firſt, ſaid he thought, that, on the trial, it had not been properly underſtood.

This ſecond *mandamus* was depending, in the court of King's Bench, at the time of the election. It was tried in Michaelmas term (8), and determined in like manner as the former; and there was no application for a new trial.

On

(8) 19 Nov. 1774.

On this ſtate of the facts, the counſel for the ſitting member inſiſted; That the right of the controverted votes, and the exiſtence of the cuſtoms, were ſtill open to the diſcuſſion of the Committee; that the two *mandamuſes* were only concluſive between the parties; and that, on the trial of new *mandamuſes*, the two former verdicts, although they might have great weight as evidence, would not conclude the jury.

They ſuggeſted, that, ſince the laſt trial, and after the four days had elapſed which the court allows for moving for a new trial, they had diſcovered freſh evidence, which if laid before the Committee, would overturn the cuſtoms.

The counſel for the petitioners contended, on the contrary; That under circumſtances like thoſe of the preſent caſe, two verdicts, free from all ſuſpicion of colluſion, (the two mayors, againſt whom both the verdicts had been found, having continued to be warm partizans of the ſitting members at the election, (9), unimpeached, and not diſapproved of by the judge, would be concluſive evidence *as to the cuſtoms*, even in a court of law, becauſe the parties to be bound by them, on a new *mandamus*, would be the ſame, viz. the corporation of Shrewſbury; that on two ſuch verdicts, a court of equity would make a decree to eſtabliſh a cuſtom, and would not grant a third trial; but that, if this were otherwiſe, a Committee of the Houſe of Commons would never ſuffer two ſolemn verdicts, and conſequent judgments of the only court competent to ſuch cauſes, to be called in queſtion before them. They ſaid that, even in the Middleſex caſe, nobody had ever attempted to impeach the verdict finding Mr. Wilkes guilty of the libel.

The counſel for the ſitting members cited ſeveral caſes where courts of law had granted new trials after two concordant verdicts, and others, where courts of equity had done the ſame. But they were all ſhown to be caſes where the judge who tried the cauſe ſignified his diſapprobation of the verdict; and, beſides, it was ſaid that a verdict *before judgment*, once it is ſet aſide, is conſidered as if it had never exiſted.

On the other ſide, the caſes of the duke of Beaufort, and of Mancheſter Mills, were cited, among others. The latter came on in the duchy court before Lord Kinnoul, aſſiſted by Lord Mansfield, who ſaid, on that occaſion, that a verdict in

(9) This was not denied.

the time of Charles the Firſt (which was produced in the cauſe) was concluſive evidence of the cuſtom.

After this point had been argued, and the counſel directed to withdraw, the Committee, after ſhort deliberation,

Reſolved, not to admit any evidence to impeach the two verdicts, but to conſider them as concluſive evidence of the cuſtoms.

The ſitting member's counſel then endeavoured to prove,

That the rejected voters had not applied in the proper manner, and according to the eſtabliſhed uſage, to be admitted to their freedom;

But it came out, from the evidence, that the mode of their application was regular.

They then contended,

That, as the title of thoſe men to their freedom was in ſuſpence, and under litigation in Weſtminſter-hall, when their votes were rejected, they could not be of any avail as to *this* election; for that, in inſtances where the votes of men who had applied for their freedom and were refuſed, have been allowed, on proving their titles, the caſe had been always ſuch as to ſatisfy the Committee, or the Houſe, that there was no *juſt* ground for refuſing them, and that it was done by concert with a candidate, and in order to affect the election.

The Committee, however, on the ſame day (Wedneſday, the 8th of March), informed the Houſe, by their Chairman, that they had determined;

That William Pulteney, Eſq; was duly elected, and ought to have been returned (1).

(1) Votes, p. 343.

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